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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SANTA MARIA, CALIFORNIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the election of a minority preferred Anglo candidate who was the first choice of minority voters deserves less evidentiary weight than the defeat of a minority candidate who was the second preference of minority voters, in a Section 2 Voting Rights Act case?

2. Whether the Ninth Circuit erred in ruling that a district court, in applying the "special circumstances" doctrine, may disregard the election of minority candidates during the pendency of voting rights litigation, when those minority candidates were the preferred candidates of minority voters, and there is *no evidence* that the minority candidates' election was the result of white efforts to thwart the lawsuit, or the result of any other factors related to race?

PARTIES TO THE PROCEEDING

The parties to this case are plaintiffs Esperanza Ruiz, Joseph Talaugon, Iltra Garcia, and Francisco Delgado and defendants City of Santa Maria, City Council of Santa Maria, Roger Bunch, Toru Miyoshi, Joseph Centeno, Abel Maldonado, Bob Orach, City Council members, and Janet R. Kalland, City Clerk; all sued in their official capacities.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The City of Santa Maria respectfully petitions for a writ of certiorari to reverse the judgment, or portions of the judgement, of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 160 F.3d 543. The order of the court of appeals denying the City of Santa Maria's petition for rehearing with suggestion for en banc review (App., *infra*, 36a-37a) is unreported. The court of appeals order staying mandate (App., *infra*, 38a) is unreported. The relevant opinion of the district court (App., *infra*, 39a-53a) is unreported.

JURISDICTION

The court of appeals opinion was issued on November 5, 1998. The court of appeals order denying the petition for rehearing with suggestion for rehearing en banc was entered on February 23, 1999. The court of appeals order granting a Rule 41(b) request for stay of the mandate for its judgment was entered on March 15, 1999. (App., *infra*, 38a.) The jurisdiction of this court is invoked under 29 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, provides, in part, that

> "(a) No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . . (b) A violation of . . . this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . . *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE CASE

This is a case in which four Hispanic citizens of the City of Santa Maria challenge the legality of the City's at-large system of electing City Council members under Section 2 of the federal Voting Rights Act, 42 U.S.C. § 1973, because it allegedly "dilutes" the ability of Hispanic voters to elect candidates of their choice.

Vote dilution occurs when: (a) a minority group is unable to elect its candidates at large, (b) whom it could elect in a single member district where that group is an effective voting majority. *Thornburg v. Gingles*, 478 U.S. 30, 68, 106 S.Ct. 2752 (1986). Hispanic plaintiffs therefore seek to invalidate Santa Maria's at-large City Council system election, and replace it with a single member district system.

The district court, on its own motion, issued an order to show cause as to why the case was not moot when the 1994 elections for City Council resulted in the election of 2 Hispanics to the two open Council seats that year on the 5 member City Council (consisting of 4 Council members and one mayor). After briefing, the district court issued an order dismissing the case as moot, and also granted the City of Santa Maria's motion for summary judgment, based on plaintiffs' inability to prove that white bloc voting usually defeats the preferred candidates of Hispanic voters, as required under *Thornburg, supra*.

The court of appeals reversed the district court judgment on both legal grounds and remanded the case back to the district court for trial, in an opinion enunciating unprecedented new legal standards on what evidence is relevant and how evidence should be weighed in a Section 2 case, that was intended to govern the trial court on remand.

One of three panel judges, J. Wallace, dissented from these sections of the Court of Appeals opinion (parts IV.B (App., *infra*, 14a-18a) and IV.D (App., *infra*, 21a-26a)). Petitioner and defendant City of Santa Maria filed a petition for rehearing to delete parts IV.B and IV.D of the opinion, which was denied.

Thus, it is these new legal restrictions on evidence in Section 2 cases set forth in parts IV.B and IV.D of the Court of Appeal opinion which the City of Santa Maria seeks a writ of certiorari to reverse.

A. Statement of Facts

Santa Maria is a California general law city that is located in Santa Barbara County. Since its incorporation in 1905, it has employed an at-large or citywide electoral system to elect its City Council. (App., *infra*, 2a.)

There are four City Council seats and a mayor who is separately elected, also citywide. City Council elections are held every two years at which time two of the four seats on the Council are filled. The candidates receiving the two highest vote totals of all candidates running are elected to the City Council for four year terms of office. There is no majority vote requirement and no runoff requirement. (App., *infra*, 2a.)

In Santa Maria voters may cast two ballots in each election for the two open Council seats, but there is no "anti-single shot" requirement that they must do so for their ballot to count. If they so choose, Hispanic voters may "bullet vote" or cast just one ballot for a single candidate and deny Anglo candidates their other vote, thereby improving the chances of electing the Hispanic candidate. (App., *infra*, 2a.)

Under Santa Maria's election system, the mayor is separately elected every two years. The mayor's race is a single seat election in which by definition single shot voting is not possible. The mayor is elected by plurality vote. (App., *infra*, 2a.)

In three of the last four City Council elections studied by the parties' experts, the first preference of Hispanic voters was elected: Tom Urbanske in 1988 and 1992 and Abel Maldonado in 1994. In the November, 1994 City Council election both Hispanic preferences were elected to the two seats up for election: Abel Maldonado and Joe Centeno. The two Anglo preferences were Anglo incumbent Bob Orach and Joe Centeno. Thus, Hispanic voters elected both their preferences in this election, while Anglos elected only one of theirs. Maldonado was elected despite the fact that he was not an Anglo preference and would not have been elected if only Anglo votes were counted. Hispanics vetoed the Anglo first preference, Anglo incumbent Bob Orach, who received only minimal support from Hispanics. Hispanics also elected their preferred candidate for Mayor in 1994. (App., *infra*, 3a-5a, 5a fn.8, 28a-29a, 57a-59a.)

Joe Centeno who was elected in 1994 has lived in Santa Maria nearly all his life, was with the City's Police Department for 35 years and was Chief of Police for 10 years. Plaintiffs concede that his election was not a fluke and that he would be a formidable candidate any time he chose to run. Abel Maldonado is a young Hispanic businessman and Republican who grew up in Santa Maria and whose family has been in Santa Maria for years. He spent more money than any other candidate in the history of Santa Maria City Council elections. (App., *infra*, 55a-57a, 60a-63a, 67a-69a.) The Court of Appeal ruled that the trial court should focus on the amount of *Anglo* financial support he received ($6,625) (App., *infra*, 26a), without acknowledging that *Hispanics*,

including Maldonado and his family, spent an unprecedented amount of money ($25,362) on his election, more money in fact than any Anglo candidate ever spent. (App., *infra*, 74a-78a.)

There was no evidence that Anglos voted for Maldonado and Centeno to end the lawsuit, or that Anglos endorsed them or contributed money to their campaigns to end the lawsuit. *None of the candidates believed that the lawsuit affected the outcome of the 1994 election.* (App., *infra*, 21a, 55a-57a, 61a-62a.)

Hispanics also were not injured by the 1992 election. Both Anglos and Hispanics elected their first and third preferences. 38.4% of Hispanics supported Urbanske in that election, 35.9% voted for Fernando Castillo and 31.5% for Toru Miyoshi. Urbanske, who was the Hispanic first preference, and Miyoshi were elected. The Anglo preferences in this election were Urbanske and Anglo incumbent Dan Firth who was defeated. Miyoshi was the third preference of both Hispanics and Anglos, and was elected because he received some support from Hispanics but Firth did not. Hispanics therefore vetoed the Anglo second preference. (App., *infra*, 4a, 28a, 58a-59a.)

In 1990, the Hispanic first preference was Gil Guevara who lost. Anglo incumbents Curtis Tunnel and Bob Orach were elected. In 1988, the Hispanic preferences were Tom Urbanske who was elected and Hispanic Felix Martel who was not. Both Anglo preferences, incumbent Tom Urbanske and former Councilman Dan Firth, were elected. (App., *infra*, 3a, 28a.)

Of eight seats elected in these four City Council elections, then, Hispanics elected at least four of their preferences, five if Miyoshi is counted. At the time judgment in

the district court was entered, the City Council had three minorities: Abel Maldonado and Joe Centeno who are Hispanic, and Toru Miyoshi who is Asian. At least three of the four elected members of the Council at that time were Hispanic preferences: Maldonado, Centeno and the Mayor, four if Miyoshi is counted. (App., *infra*, 5a fn.8, 28a-29a.)

Subsequent to judgment in the trial court, another City Council election was held in November, 1996. Abel Maldonado, an Hispanic who won a four year City Council seat in 1994, was elected mayor. (App., *infra*, 7a fn.13.)

Santa Maria's total population composition in 1990 was as follows:

Anglo	46.4%
Hispanics	45.7%
Black	1.9%
Asian, Pacific Islander, Other	5.9%

The Hispanic population has increased significantly in recent years. In 1970, for example, Santa Maria had a total population of 32,749, of which 8,819 or 27% were Hispanic. By 1990, Santa Maria had grown to a city of 61,284, of which 28,014 or 46% were Hispanic. Thus, the number of Hispanics in Santa Maria more than doubled between 1980 and 1990 and more than tripled between 1970 and 1990. (App., *infra*, 2a, *see also*, 65a-66a.)

Plaintiffs were able to create but one proposed *Thornburg* remedial district containing a quarter of Santa Maria's total population and in which Hispanics are a 57% majority of the voting age citizens as of 1990. Non-Hispanics or Anglos would be a majority of the voting age

citizens and registrants in the other three Council districts. (App., *infra*, 72a.).

REASONS FOR GRANTING THE PETITION

Petitioner City of Santa Maria seeks certiorari to reverse two rulings in the November 5, 1998 Ninth Circuit opinion that plainly are contrary to Supreme Court and Circuit Court voting rights decisions. More specifically, the City seeks to delete parts IV.B and IV.D of the majority opinion setting forth plainly erroneous legal standards to guide the trial court on remand on what evidence to consider and what weight to be given evidence in a Section 2 voting rights case. One of the panel members (Wallace, J.) dissented from these two sections of the opinion.

Certiorari is appropriate because the holdings in these two sections of the majority opinion overlook material points of law and are directly contrary to prior decisions of the Supreme Court, the Ninth Circuit and other Circuits, including a recent Sixth Circuit opinion not addressed by the panel decision. Review is appropriate to secure uniformity of Circuit decisions and because each of the two challenged rulings substantially affects a rule of national application as to which there is an overriding need for national uniformity.

To prevail in this matter alleging violation of Section 2 of the Voting Rights Act, plaintiffs must prove, based on the "totality of circumstances," that Santa Maria's at-large City Council electoral system "results" in the "dilution" of Hispanic voters' electoral opportunities, 42 U.S.C. § 1973. Vote "dilution" occurs when: (a) a minority group is unable to elect its preferred candidates at large, (b) whom it could have elected in a single member district where that group is an "effective" voting majority. *Thornburg*, *supra*, 478 U.S. at 68, 106 S.Ct. at 2775.

After ruling correctly that the minority group's preferred candidate need not be a minority in a Section 2 vote dilution case (Part IV.A.1 of the Opinion, App., *infra*, 11a-13a), the panel majority then declared that the success of an Anglo candidate who in this case was minority voters' first preference in Santa Maria's 1988 and 1992 multi-seat elections deserves less evidentiary weight than the defeat of minority candidates who were the second preference of minority voters in each of those elections. (Part IV.B of the Opinion, App., *infra*, 14a-18a.) This novel legal standard which is unsupported by any case law contravenes settled Supreme Court voting rights jurisprudence. It also denies the legitimacy of expressed minority voter preferences in actual elections in contravention of Supreme Court precedent and engages in the kind of racial stereotyping frequently condemned by this Court.

The majority opinion, if allowed to stand, threatens to produce unsound decisions in this and future voting rights cases in the Ninth Circuit and to undermine the validity of previous voting rights decisions in the Ninth Circuit and elsewhere. Additionally, the Sixth Circuit recently issued an opinion directly contrary to the result here, which the panel majority overlooked.

The panel majority also authorized the trial court on remand to discount elections won by Hispanics during the pendency of this litigation, even when there is *no evidence* that post-litigation Hispanic successes were engineered to thwart the lawsuit or were otherwise the result of *racial* factors. This ruling is directly contrary to Supreme Court, Circuit Court and Ninth Circuit decisions. Some of the decisions, overlooked by the panel majority, hold that the express language of the Voting Rights Act defines "dilution" to be an injury "on account of race or color," in the absence of which

federal courts have no jurisdiction, and would be acting unconstitutionally, to intervene in local electoral processes.

Finally, the two rulings were unnecessary to the result and, as the dissenting panel member notes, they "usurp" the discretion of the trial court to consider and weigh evidence. The City therefore urges review of this Ninth Circuit panel opinion to avoid an unsound decision on remand that may result in yet another appeal and subsequent retrial.

A. The Panel Majority, In According Less Weight to Minority Preferred Anglo Candidates, Departs from Settled Voting Rights Law, Usurps the Trial Court's Role in Weighing Evidence and Is Unnecessary to the Result

The trial court granted summary judgment on the ground that plaintiffs could not prove that white bloc voting usually defeated the preferred candidates of minority voters, one of the three "necessary preconditions" plaintiffs must prove to prevail in a Section 2 vote dilution case under *Thornburg*, *supra*, 478 U.S. at 50-51.

Those preconditions are:

1. *The minority group must be sufficiently large and geographically compact to constitute an effective voting majority in a single member district.* Under this first precondition, plaintiffs must create a hypothetical, single member district in which Hispanics will constitute an "effective voting majority." *Id.* at 38. The rationale for the requirement is that unless plaintiffs are "able to elect" in a single member district, the at-large system "cannot be responsible for minority voters' inability to elect." *Id.* at 50.

2. *The minority group is politically cohesive.* If Hispanics are not politically cohesive, then "it cannot be said that the selection of a multimember electoral structure [at-large system] thwarts distinctive minority group interests." *Id.*

3. *The white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, to usually defeat the minority's preferred candidate.* *Id.* at 48-51. Plaintiffs must prove more than racially polarized or white bloc voting. To be *legally significant*, white bloc voting must "regularly defeat the choices of minority voters". *Id.* at 48.

Failure to prove any of the three *Thornburg* preconditions is fatal to the plaintiffs' Section 2 claim. This Court, moreover, has ruled that even if plaintiffs prove each one of *Thornburg*'s three preconditions, they cannot prevail unless the "totality of the circumstances" demonstrates that a current condition of vote dilution exists, *i.e.*, that the minority group does not have an equal opportunity to participate in the electoral process and elect candidates of its choice. *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657 (1994) (" . . . if *Gingles* so clearly defined the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination"). Ultimately, for plaintiffs to prevail in a Section 2 case, the Court after considering the totality of the circumstances must make a finding of "vote dilution." *Thornburg*, *supra*, 478 U.S. at 77-79.

In three of the four City Council elections addressed by the Court of Appeals, the first preference of Hispanic voters was elected: Urbanske in 1988 and 1992, and Maldonado in 1994. Of eight City Council seats elected in these four elections, Hispanics elected at least four of their preferences, five if Miyoshi is counted. Maldonado was elected despite

the fact that he was not an Anglo preference, and would not have been elected if only Anglo votes were counted. Hispanic voters defeated Anglo incumbents in 1992 (Firth) and in 1994 (Orach) and were the decisive factor in defeating George Hobbs for mayor in 1994. At the time of the trial court decision, the Council had three minorities: Maldonado, Centeno and Miyoshi. (App., *infra*, 28a-29a, 58a-59a.)

Despite this undisputed evidence, the Ninth Circuit opinion reversed the trial court's decision granting summary judgment and remanded the case for trial, setting forth legal standards to guide the trial court in applying the third *Thornburg* precondition. The panel majority, in ruling that the success of a minority preferred non-minority candidate is entitled to less evidentiary weight than the defeat of a minority preferred minority candidate (part IV.B, App., *infra*, 14a-18a), obscured the true issue raised by the undisputed facts of this case. This is not a case about white only elections in which minority voters had no minority candidates to support. Nor is it a case about a multiseat election system in which minority voters' first preference was a sole minority candidate who lost and whose second preference had to be an Anglo candidate because there were no other minority candidates available to choose.

This case involves elections in 1988 and 1992 in which Hispanic voters' first preference was an Anglo who won, and their second preference was an Hispanic who lost. These were racially contested elections in which Hispanics gave more votes to the Anglo candidate than to the minority candidate.

As the panel majority acknowledges, the Supreme Court in *Thornburg* split on whether the race of the candidate is irrelevant in a Section 2 vote dilution case, but since then the Circuits uniformly have held that a minority preferred

candidate need not be a minority, a position the panel opinion also embraces (Part IV.A.1, App., *infra*, 11a-12a). None of these Circuit decisions, moreover, adopted the panel majority's rule that minority preferred Anglo candidates are to be accorded less evidentiary weight, which clearly is at odds with these decisions. Indeed, Judge Wallace, dissenting, notes that there is "considerable tension" between Parts IV.A.1 and IV.B of the panel opinion. (App., *infra*, 31a.)

The panel majority, moreover, overlooked the Supreme Court's admonition against racial stereotyping. Condemning racial gerrymanders because they bear an "uncomfortable resemblance to political apartheid," Justice O'Connor noted that a racial stereotype "reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and *will prefer the same candidates at the polls*. We have rejected such perceptions elsewhere as impermissible stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 2827 (1993) (emphasis supplied). The panel majority also overlooked a similar admonition in *Johnson v. De Grandy*, *supra*, 512 U.S. at 1020, 114 S.Ct. at 2661, where Justice O'Connor recognized that minority voters must "pull, haul and trade to find common political ground" with coalitions consisting of voters from other racial and ethnic groups to elect candidates of choice "who may not represent perfection to every minority voter." *See also NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995) (to hold that a nonminority cannot be a minority preferred candidate would be "electoral apartheid"); *Lewis v. Alamance County*, 99 F.3d 600, 607 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229, 117 S.Ct. 1820 (1997) (presumption that minority voters prefer minority candidates disenfranchises minority voters who do not). There is no way to square these condemnations of racial stereotypes with the panel majority's standard.

Indeed, Judge Wallace, dissenting, notes that the majority, in elevating a minority preferred minority candidate to a higher status merely because of his or her race, "embraces the very view of 'electoral apartheid' that it rejects in Part IV.A.1." (App., *infra*, 31a.)

Ninth Circuit cases have accorded minority preferred Anglo candidates the same evidentiary weight as minority preferred minority candidates. In *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992), the Ninth Circuit treated the election of minority preferred Anglo candidates as dispositive (*id.* at 1296-97), and, as to losing minority candidates, noted that "appellants too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority-preferred candidates." *Id.* at 1297. *See also Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), where the minority preference for Anglo candidates was fatal to plaintiffs' claims, and *Aldasoro v. Kennerson*, 922 F. Supp. 339, 348, 362 (S.D. Cal. 1995) in which Hispanic preferred Anglo candidates who won were given the same evidentiary weight as Hispanic preferred Hispanic candidates who lost.

The panel majority cited *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1534 (1989) as contrary to *Valladolid* but all that can be gleaned from *Gomez* is that Hispanic voters in that case *always* chose Hispanic candidates as their first preference whenever they ran for City Council, which are not the facts in this case. *Gomez*, moreover, conflicts with the panel majority's ruling because of its instruction that minority political cohesion is to be determined "on the basis of voting preferences expressed in actual elections" (*id.* at 1415) and that courts are to look "only to *actual voting patterns*," *id.* at 1416, an instruction the panel majority's new legal standard offends.

Thus, the panel majority not only dictates application of an erroneous legal standard on remand in this and future voting rights cases, but undermines the validity of previously decided Ninth Circuit cases and district court decisions within the Ninth Circuit.

The decisions of other Circuits cited by the panel majority are inapposite. *Jenkins v. Red Clay Consol. School Dist. Bd of Educ.*, 4 F.3d 1103, 1128 n. 22 (3d Cir. 1993), *cert. denied*, 512 U.S. 1252, 114 S.Ct. 2779 (1994), and *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark.) (three judge panel), *aff'd*, 488 U.S. 988, 109 S.Ct. 548 (1988) addressed the subject of white only elections, which are not the facts here. Nor did *Citizens for a Better Gretna v. City of Gretna, Louisiana*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213 (1989), accord greater weight to the defeat of black candidates.

The panel majority says that "the Sixth Circuit alone has addressed this issue" in *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109, 115 S.Ct. 1960 (1995), but *Clarke* dealt with a complex proportional representation election system not remotely like Santa Maria's system and the opinion never makes clear whether black preferred Anglo candidates received greater black support than losing black preferred black candidates, as occurred in Santa Maria in 1988 and 1992. Indeed, the same Sixth Circuit on June 1, 1998 issued an opinion, overlooked by the majority, squarely rejecting the panel majority's new standard. *Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1026 (1999) ("The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority preferred candidates, whatever their race, usually lose"). The Sixth Circuit did not give greater evidentiary weight to minority preferred minority candidates. There is no authority to support the panel

majority's legal standard which is a racial stereotype that denies the legitimacy of minority voters' expressed voting preferences, and is contrary to *Gomez* and common sense.

Judge Wallace also articulates concern about the workability of the majority's standard, and about the invasion of the trial court's discretion to determine in the first instance the weight to be given to particular election results. As the panel majority acknowledges, Hispanics cast the deciding vote in the 1994 mayoral election in support of a white candidate who defeated the long time mayor whom Hispanics regarded as unsympathetic to their interests. The panel majority's standard would give less weight to this important election than to the defeat of Hispanic voters' second preference in 1992 who was Hispanic. This would be true even though Hispanics, who preferred an Anglo candidate more than a Hispanic candidate, and preferred an Asian candidate nearly as much as the Hispanic candidate, were not very cohesive in that election. *East Jefferson Coalition for Leadership and Development v. Jefferson Parish*, 691 F. Supp. 991, 1003 (E.D. La. 1988) (Black candidate not Black preference because Black voters split their vote evenly among one Black and two White candidates).

The panel majority's standard, then, inherently conflicts with the second *Thornburg* precondition of minority political cohesion, giving more weight to lesser supported minority candidates over more highly supported nonminority preferences. By overriding the trial court's discretion in according proper evidentiary weight to such elections, the panel majority's standard also conflicts with the "totality of circumstances" inquiry that is a mandatory element of a Section 2 vote dilution case. *Johnson*, *supra*, 512 U.S. at 1009-13, 114 S.Ct. at 2656-58 (even if plaintiffs prove each of the three *Thornburg* preconditions, they cannot prevail unless the "totality of circumstances" demonstrates that the minority

group does not have an equal opportunity to elect representatives of their choice).

It further conflicts with the ultimate finding of vote dilution that trial courts must make. *Thornburg*, *supra*, 478 U.S. at 77-79. Vote dilution occurs when (a) a minority group is unable to elect its candidates at large (b) whom it could elect in a single member district. *Id.* at 68. Vote dilution is a comparative inquiry that measures a minority group's ability to elect under the existing system against some "alternative system that would provide greater electoral opportunity to minority voters," which under *Thornburg* is single member districts. *Holder v. Hall*, 512 U.S. 874, 887, 114 S.Ct. 2581, 2589 (1994) (O'Connor concurring). Vote dilution, then, examines the lack of success of minority preferred candidates under the existing electoral arrangement, "when compared with the success that would be predicted under the measure of undiluted minority strength." *Id.* (O'Connor concurrence, quoting her opinion in *Thornburg*).

In this case, plaintiffs admitted that Hispanics could not form the majority of voters in more than one district in a four district plan. (App., *infra*, 72a[1]). Given plaintiffs' assertion of polarized voting in Santa Maria, Hispanics would not expect to elect but one preferred candidate every four years in a district election system. Thus, in 1988 and 1992 the Hispanic second preference would not have been elected anyway in an alternate system. By definition, there was no vote dilution. Only the first preference of Hispanic voters in 1988 and 1992 matters to the dilution analysis. Thus, the

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[1] "Defendants [City of Santa Maria, *et al.*] claim that 'Non-Hispanics or Anglos would be a majority of the voting age citizens in the other three districts.' . . . Plaintiffs [Ruiz, *et al.*] do not at this time dispute this fact . . ." This document, number CR 237 in the District Court docket, was included in the record before the Ninth Circuit.

panel majority's legal standard, by giving greater weight to the defeat of an Hispanic second preference which could not constitute "dilution" as a matter of law, is wholly unworkable and at odds with Supreme Court vote dilution jurisprudence.

B. The Panel Majority's Special Circumstances Standard Overlooks Settled Voting Rights Jurisprudence

Part IV.D of the panel's majority decision (App., *infra*, 21a-26a) holds that minority electoral successes can be disregarded under the "special circumstances" doctrine, even when plaintiffs are unable to prove that those successes were engineered to thwart pending voting rights litigation or that they occurred on the basis of some reason related to *race*. By directing the trial court to discount minority electoral successes on the basis of wholly *nonracial* factors, the panel majority unhinges Section 2 vote dilution analysis from its jurisdictional and constitutional underpinnings and violates prior Supreme Court and Ninth Circuit case law.

Thornburg held that an isolated minority success should be given less probative value if explained by "special circumstances." 478 U.S. at 57. Examples of special circumstances are a minority candidate running unopposed (a racially uncontested election), incumbency or because of pending litigation, Anglos give unusual organized support to minority candidates *in order to defeat the lawsuit*. *Id.* at 76, esp. at n. 37. Courts have disregarded or given less weight to elections won by minorities after the initiation of a voting rights suit, on proof that Anglos manipulated the election of a safe minority candidate (*id.* at 75) or where a minority candidate prevailed because of "unusual organized political support by white leaders *concerned to forestall single member districting*." 478 U.S. at 76 (emphasis supplied). *See also Valladolid*, *supra*, 976 F.2d at 1298 ("pending voting rights

litigation might lead majority politicians and voters to support a minority candidate *in an effort to defeat the lawsuit*") (emphasis added); *NAACP v. City of Niagara Falls*, *supra*, 65 F.3d at 1021 (no evidence of any attempt by white voters to thwart litigation).

As the panel majority acknowledges, plaintiffs concede that there is no evidence that the success of two Hispanic Council candidates in 1994 was due to the pendency of the lawsuit. (App., *infra*, 21a.) None of the candidates believed that the lawsuit had any impact on the outcome of the election. There was no evidence that any Anglo voted for the two minority candidates to secure a dismissal of the lawsuit or gave money or endorsed them for that purpose. Plaintiffs' own political scientist Dr. Engstrom admitted that one of the candidates (Centeno) had high name recognition, was thought of highly in the community and did not need district elections to get elected. Hispanic citizens contributed more money to the other minority candidate's campaign than any Anglo candidate ever spent in prior elections. Dr. Engstrom also admitted that it is plausible that the two minority candidates won, and prior candidates lost, not because of racial reasons but because of differences between the candidates. Given recent increases in Hispanic population, citizenship and registration, Dr. Engstrom also conceded that the 1994 election was more probative of current Hispanic ability to elect than the 1988 election. (App., *infra*, 61a-66a.) Case law gives more weight to recent elections where there have been significant demographic changes, as have occurred here. *Rollins v. Fort Bend Indep. School Dist.*, 89 F.3d 1205, 1220 (5th Cir. 1996) (older elections discounted because of dramatic population changes); *Vecinos De Barrio Uno ("Uno") v. City of Holyoke*, 72 F.3d 973, 989-90 (1st Cir. 1995) (district court may have undervalued import of increasing Hispanic population and political participation); *Al-*

dasoro, *supra*, 922 F. Supp. at 360, 362 (more recent elections more probative).

Lacking any evidence that the two minority candidates won because of the pendency of the lawsuit, plaintiffs contended that the 1994 election was aberrational and should be discounted on the basis of purely *nonracial* factors such as higher Anglo voter support and financial contributions than Hispanic candidates received in prior elections. The panel majority opinion erroneously adopted that standard (part IV. D, App., *infra*, 24a-25a). These facts are insufficient as a matter of law to warrant application of the special circumstances doctrine, and worse would preclude other racially neutral explanations that Centeno and Maldonado were stronger candidates who ran better campaigns than previous Hispanic candidates, or were due to Hispanic demographic increases.

No case ever discounted an election under the special circumstances doctrine based on such racially neutral factors. As a matter of law, plaintiffs *must* prove that the victories by the two minority candidates are aberrational *in the sense that they are the product of race*, rather than because of racially neutral factors like the amount of money spent. This was made clear in several recent Circuit decisions that the Panel majority overlooked. The Eleventh Circuit in *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083, 115 S.Ct. 1795 (1995), explains that under the express language of Section 2 plaintiffs must demonstrate that a minority electoral defeat (or success) occurred *on account of race or color*, "not on account of some other racially neutral cause." To hold otherwise would be to read the words "on account of race or color" out of Section 2 and create a de facto right to proportional representation explicitly prohibited by Section 2. *Id.* at 1516. The standard adopted by the Eleventh Circuit "simply allows a defendant to rebut

proof of vote dilution by showing losses by minority preferred candidates are attributable to nonracial causes." *Id.* at 1526. *See also League of United Latin American Citizens ("LULAC") v. Clements*, 999 F.2d 831, 854, 855-57 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071, 114 S.Ct. 878 (1994) (partisan affiliation not race explains minority electoral losses; therefore no dilution); *Uno*, *supra*, 72 F.3d at 980-84. The Ninth Circuit also has adopted this view in *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586, 596 (9th Cir. 1997), which cannot be squared with the panel majority's decision.

The panel majority inexplicably holds that proof of discriminatory motive to thwart the lawsuit "has no part in a vote dilution claim." This ruling is contradicted by the express language of *Thornburg*, *supra*, 478 U.S. at 76 and n.37, *Smith*, *supra*, 109 F.3d at 596, and *Valladolid*, *supra*, 976 F.2d at 1298. Additionally, the "intent" issue removed by amended Section 2 in 1982 was the requirement imposed in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980) to prove racial motivation in the adoption and maintenance of an at-large election system. *Nipper*, *supra*, 39 F.3d at 1522; *LULAC*, *supra*, 999 F.2d at 862; *Uno*, *supra*, 72 F.3d at 982. Justice Brennan wrote in *Thornburg*, *supra*, 478 U.S. at 63-74, that the reasons why voters vote as they do is irrelevant to a Section 2 claim but his opinion did not command a majority. Justice O'Connor's disserting view that causation is relevant to the overall dilution inquiry (*id.* at 100-101) has prevailed with the Supreme Court's decision in *Johnson*, *supra*, 512 U.S. at 1009-13, that *requires* examination of other factors under the "totality of the circumstances" before reaching a conclusion about dilution. Thus, courts are obliged under the "totality of circumstances" test to determine whether minority electoral losses (or successes) are the result of racial factors or explainable on non-racial grounds. *LULAC*, *supra*, 99 F.2d at 850-55, 862-63; *Nipper*, *supra*, 39 F.3d at 1512-17, 23-26; *Uno*, *supra*, 72 F.3d at 979-83; *Lewis*

v. Alamance County, *supra*, 99 F.3d at 615 n. 12. Were it otherwise, every election would be aberrational because every election is "unique" or different in some nonracial manner. *Clarke*, *supra*, 40 F.3d at 813-14; *Rollins*, *supra*, 89 F.3d at 1213-14 (rejecting a standard that would require every minority electoral success to fit a special circumstance).

The panel majority directs the trial court to consider increased Anglo voter support for the two minority candidates without determining whether that increased support was due to nonracial factors such as the strengths of the candidates and of their campaigns, or to some factor related to race, such as an attempt to thwart the lawsuit. This plainly denies a defendant the opportunity to demonstrate that minority candidate's election was attributable to racial factors. As the authorities make clear, federal courts have no jurisdiction statutorily or constitutionally under the Voting Rights Act unless a result occurs "on account of race or color." *Nipper*, *supra*, 39 F.3d at 1515-16. The panel majority entirely overlooked these seminal principles of national application, relying on a distant Fourth Circuit case decided before *Smith*, *LULAC*, *Nipper* and *Uno*, and before the Fourth Circuit itself adopted the causation analysis of those cases, thereby implicitly overruling *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987) and 883 F.2d 1232 (4th Cir. 1989). *Lewis*, *supra*, 99 F.3d at 615, n.12.

The panel majority also overlooks settled voting rights jurisprudence in criticizing both parties for examining the qualifications of candidates. This ruling for which no legal authority is cited is manifestly incorrect as it is directly contrary to the instruction in *Johnson v. De Grandy*, *supra*, that courts must consider the totality of circumstances before reaching a conclusion about vote dilution. The panel majority, moreover, completely overlooked numerous decisions

that have discounted the electoral defeats of weak, inexperienced or nonviable minority candidates that ran poor campaigns and therefore would give a false impression of the ability of minority voters to elect candidates of choice. *Rollins*, 89 F.3d at 1213, 1215; *Uno*, *supra*, 72 F.3d at 983, esp. nn. 4 and 5; *Aldasoro*, *supra*, 922 F. Supp. at 348-50, 374-75 (collecting cases); *Romero v. City of Pomona*, 665 F. Supp. 853, 861 (C.D. Cal. 1987 (poor campaign)), *aff'd*, *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1329, 1335-36 (C.D. Cal. 1990) (disregarding minor or marginal Hispanic preferred Hispanic candidates), *aff'd*, 918 F.2d 763 (9th Cir. 1990). The strong qualifications of the two successful minority candidates in 1994 compared to prior Hispanic candidates obviously are relevant to any determination of whether their successes were aberrational. *NAACP v. City of Niagara Falls*, *supra*, 65 F.3d at 1021 fn. 22 ("It borders on the absurd, of course, to suggest that an individual's success in politics should be discounted as aberrational because the person is qualified and popular"). Disregarding such evidence is plainly contrary to the totality of the circumstances inquiry.

The panel majority clearly overlooked material points of law and contrary decisions on an issue that as Judge Wallace, dissenting, notes, properly is part of the district court's ultimate vote dilution inquiry and unnecessary to decide now.

CONCLUSION

The City therefore urges that its Petition for Writ of Certiorari be granted to delete parts IV.B and IV.D from the Ninth Circuit opinion, from which J. Wallace dissented.

Respectfully submitted.

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APRIL 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; BOB ORACH; JANET R. KALLAND, City Council Members, City Clerk; all sued in their official capacities; ROGER BUNCH; TORU MIYOSHI; JOSEPH CENTENO; ABEL MALDONADO,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI

OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
February 2, 1998 - Pasadena, California

Filed November 5, 1998

Before: J. Clifford Wallace, Stephen S. Trott and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion; Partial Concurrence and Partial Dissent by Judge Wallace; Partial Concurrence and Partial Dissent by Judge Hawkins

PER CURIAM:[1]

Four Hispanic residents and registered voters of the City of Santa Maria challenge the City's at-large city council election system under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. While the case was pending, two Hispanic candidates were elected to the city council. The district court dismissed the complaint as moot and, alternatively, granted summary judgment in favor of the City. We hold that the district court erred in dismissing the case as moot and applied erroneous legal standards to the Plaintiffs' vote dilution claim and, therefore, we reverse.

I. FACTS

Santa Maria is a California general law city located in Santa Barbara County. Since its incorporation in 1905, it has employed an at-large system for electing its mayor and city council members. The mayor, who is also a member of the city council, is elected by a citywide plurality vote to serve a two-year term. Council members are elected by a citywide plurality vote for four-year terms. Their terms are staggered so that two council members are elected every other year. Each registered voter can vote for two candidates but is not prohibited from casting a single ballot ("single-shot" or "bullet" voting).

The City's 1990 population of 61,284 has doubled since 1970. According to the 1990 Census, 46.4% of the City's population is white, 45.7% is Hispanic, 1.9% is black, and 5.9% is Asian, Pacific Islander, or other.[2] The Hispanic population is growing: Hispanics were 27% of the City's population in 1970 and 33% in

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[1] Judge Trott joins in all of the Opinion. Judge Wallace joins in all but parts IV.B and IV.D. Judge Hawkins joins in all but part IV.A.2.

[2] We recognize that labels such as Hispanic, Hispano, Mexicano, Latino, white, Anglo, black, African-American, or Asian have different meanings to various groups. For purposes of simplicity and convenience, we attach no particular significance to any label and use broad terms such as "white," "Hispanic," and "black."

1980. The parties' experts agreed that Hispanic population, citizenship, and voter registration will continue to grow but disagreed at what rate. While Hispanics comprised nearly one-half of the City's population in 1990, they were only 28.7% of the voting age citizen population.

Prior to 1994, no Hispanic had ever been elected mayor or council member. Twelve Hispanics ran and lost in city council and mayoral elections from 1972-1992 -- all but two placed last. The parties' experts studied four city council elections (1988, 1990, 1992, and 1994) and the 1990 mayoral election in depth and provided detailed statistical reports.[3] These reports showed that while Hispanic candidates were the first or second preference[4] of Hispanic voters in each election, Hispanic candidates were the least-preferred among non-Hispanic voters and came in last every time, except in 1994.

In 1988, four candidates ran for city council. Tom Urbanske, the incumbent who was white, was Hispanic voters' first preference. A Hispanic candidate was Hispanics' second preference but came in last overall, receiving only 15.7% of the non-Hispanic vote. Urbanske and another white candidate were elected.

In 1990, the City's long-time mayor, George Hobbs, was under fire from the Hispanic community for complaining about a "Mexican problem" in Santa Maria.[5] He easily won the mayoral

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[3] One expert performed a "bivariate ecological regression analysis" and a "homogeneous precinct analysis" for all five elections. Another conducted an exit poll analysis for the 1990 city council and mayoral elections.

[4] In other words, the first-preferred candidate among Hispanics received the most Hispanic votes; the second-preferred candidate received the second most votes from Hispanic voters.

[5] " 'At this time in Santa Maria, we have a Mexican problem,' Hobbs claimed. 'We have a difficulty with scads of illegal aliens that have come across the border, and they've made our neighborhoods look not like Santa Maria neighborhoods. In certain streets, people (are) gathered around in groups drinking beer, smoking cigarettes. It's a formidable experience for a lot of the older people who have been here for a long time.' " Jeanne Sparks, *Hobbs: Illegal alien situation out of hand*,

election, receiving 71.4% of the non- Hispanic vote but only 13.3% of the Hispanic vote. Another white mayoral candidate withdrew from the race two months before the election because the community was so polarized along racial lines. Nevertheless, he finished second overall, receiving more non-Hispanics' votes than the two Hispanic candidates combined. The Hispanic candidates finished last and next-to-last, despite being Hispanic voters' first and second preferences.

The Hispanic candidate did not fare any better in the 1990 city council election. The Hispanic candidate was the first preference of Hispanic voters, receiving 66.2% of Hispanics' votes. Nonetheless, he received only 8.6% of the non-Hispanic vote and came in last out of five candidates. The two white incumbents, the first and second preferences of non-Hispanics while least- preferred by Hispanics, were re-elected.

In 1992, Urbanske, the white incumbent, was again Hispanic voters' first preference out of seven candidates. Hispanics' second preference, a Hispanic candidate, was least-preferred by non-Hispanic voters and came in last. Urbanske and Toru Miyoshi,[6] the third preference of Hispanics and non- Hispanics, were elected.

Plaintiffs filed this action in August 1992, seeking a declaration that the City's at-large election system impermissibly diluted the vote of Hispanics and an injunction creating a single-member district election system. Plaintiffs proposed a four- or five-district system in which Hispanics would comprise a majority of the voting age citizen population in one district. On the day before the July 1994 trial, the district court vacated the trial date because

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Santa Maria Times, July 17, 1990, at 5. Hobbs stated he was not referring to " 'our Santa Maria Mexicans that have been here forever.' " *Id.* Hobbs proposed that U.S. tax money " 'that's wasted up here in programs and welfare' " be used to build colonies in Mexico to " 'make it so good for them that they would be willing to stay there.' " *Id.*

[6] Interestingly, Miyoshi, an Asian candidate, campaigned on his "[c]ommitment to address the 'Mexican problem.' " He promised he would "address the problem with sensitivity and fairness."

Plaintiffs had submitted new trial exhibits which contained statistical information from the June 1994 statewide primary elections and the City had no time to prepare rebuttal evidence.[7] The district court continued the trial for an additional reason: "an informed ruling in this matter requires a review of the results produced by the upcoming Santa Maria election in November 1994."

In the 1994 election, two Hispanic candidates were elected to the city council. Joe Centeno, the city's former police chief, finished first, as the second preference of Hispanics and non-Hispanics. Abel Maldonado, a young local businessman, won the second seat, as the first preference of Hispanics and the third preference of non-Hispanics. Non-Hispanic voters' first preference, a white candidate, came in third. Thus, in 1994, Hispanic voters succeeded in electing their first and second preferences to the city council.[8]

In October 1995, the district court vacated the upcoming trial date and *sua sponte* issued an Order to Show Cause why the case should not be dismissed as moot. Plaintiffs argued that "special circumstances" surrounded the 1994 city council election, and thus the district court should ignore the results. Plaintiffs relied on four things to support their "special circumstances" argument:

(1) There was unprecedented crossover voting by non-Hispanics. From 1988-1992, non-Hispanic support for Hispanic city council candidates had declined, from 15.7% in 1988, to

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[7] At that time, the City's defense to Plaintiffs' vote dilution claim was Plaintiffs could not create a district in Santa Maria in which Hispanics comprised a majority of the voting age citizen population (dubbed the "*Thornburg* district"). Plaintiffs' new evidence showed that Hispanics were 59% of registered voters in the proposed *Thornburg* district in July 1994.

[8] Also, the Hispanic vote seems to have been a decisive factor in the defeat of George Hobbs for mayor in 1994. The record does not contain, however, a statistical report of the Hispanic and non-Hispanic voting percentages for that election.

8.6% in 1990, and to 4.7% in 1992.[9] Yet in 1994, 35.2% of non-Hispanics voted for Centeno, and 26.1% voted for Maldonado. It was the first election in which Hispanic candidates were not the least- preferred among non-Hispanic voters.

(2) The two Hispanic winners received endorsements from community organizations and politicians, including Mayor Hobbs, who had never before endorsed a Hispanic candidate.[10]

(3) The winning Hispanic candidates received unprecedented financial contributions from non-Hispanic individuals and businesses. Prior to 1994, no Hispanic candidate had received more than $790 from non-Hispanics. In 1994, Centeno received $4,550 and Maldonado received $6,625 from the non-Hispanic community. Also, Maldonado spent approximately $32,000 on his campaign--three times the highest amount ever spent on a council election.

(4) It was well-known throughout Santa Maria and by city council members that Plaintiffs had filed a vote dilution lawsuit and that the district court had continued the trial to evaluate the results of the 1994 election. Five days before that election, Maldonado stated in the *Santa Maria Times*, "If I get elected, it will show that the city of Santa Maria is not racist. Some parties in this lawsuit don't want to see a Hispanic on the City Council until after the suit is settled."[11]

In September 1996, the district court dismissed the case as moot under Fed. R. Civ. Proc. 12(b)(1), stating that the election of two Hispanics to the city council precluded the court from grant-

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[9] In the 1990 mayoral election, two Hispanic candidates received 6.6% and 5.1% of the non-Hispanic vote.

[10] Endorsements were received from: Curtis Tunnell, long-time city council member; Casey Kyle, former mayor; Harrell Fletcher, former county supervisor; The Committee to Improve North County, informal political action committee of the Santa Maria Chamber of Commerce; and Santa Maria Firefighters Political Action Committee.

[11] Tim Epperson, *Council Candidate gets Threatening Letter*, Santa Maria Times, November 3, 1994, at C.

ing effective relief to Plaintiffs. In the alternative, the court granted the City's Motion for Summary Judgment, finding that Plaintiffs could not prove that a majority voting bloc usually defeats the Hispanic-preferred candidate, a necessary precondition to establishing a claim of vote dilution.[12] This appeal followed.[13]

II. STANDARD OF REVIEW

We review de novo a district court's dismissal of an action on the ground of mootness and grant of summary judgment. *See Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994) (mootness); *Valladolid v. City of National City,* 976 F.2d 1293, 1295 (9th Cir. 1992) (summary judgment).

III. MOOTNESS

Article III of the Constitution limits federal courts to adjudicating actual, ongoing controversies between litigants. *See Deakins v. Mohaghan,* 484 U.S. 193, 199, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988). Generally, an action is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Lee v. Schmidt-Wenzel,* 766 F.2d 1387, 1389 (9th Cir. 1985) (internal quotations and citations omitted). "The basic question in determining mootness is whether there is a

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[12] Plaintiffs had moved for partial summary judgment, claiming that Hispanics were sufficiently large and geographically compact to constitute a majority of the voter-eligible population in a single-member district. The district court denied the motion, finding it was mooted by the 1994 election results.

[13] The City requests that we take judicial notice of the 1996 mayor and city council elections results, pursuant to Fed.R.Evid. 201(b)(2). In that election, Maldonado was elected mayor, and Miyoshi and a white candidate were elected to city council. We deny the request for two reasons. We may not rely on subsequent election results in reviewing the district court's judgment. *See Romero v. City of Pomona,* 883 F.2d 1418, 1420 n. 1 (9th Cir. 1989), *overruled in part on other grounds, Townsend v. Holman Consulting Corp.,* 914 F.2d 1136 (9th Cir. 1990) (en banc). Also, those election results do not tell us if any of the winning candidates were Hispanic-preferred, the relevant issue in this appeal.

present controversy as to which effective relief can be granted." *Northwest Environmental Defense Center v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988). Claims for injunctive relief become moot when the challenged activity ceases if "subsequent events have made it clear that the alleged violations could not reasonably be expected to recur." *Chinese for Affirmative Action v. Leguennec,* 580 F.2d 1006, 1009 (9th Cir. 1978).

The district court recognized that the effective relief Plaintiffs sought was a district election system but stated that the real reason for bringing the lawsuit was to elect Hispanic-preferred candidates. Because this result was achieved in the 1994 at-large election, the district court reasoned that a district system would not be more "effective." Therefore, the district court concluded it could not grant Plaintiffs any effective relief and declared the case moot.

Because the district court's mootness analysis misapprehends the essence of a vote dilution claim, we reverse. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 ("Section 2"), prohibits any standards, practices, or procedures that deny or abridge the right of citizens to vote on account of their race, color, or membership in a language minority group. *See Valladolid,* 976 F.2d at 1295. A Section 2 violation is any political process leading to an election that is not "equally open to participation" by a minority group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As amended in 1982, Section 2 "requires proof only of a discriminatory result, not of discriminatory intent." *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 594 (9th Cir. 1997). Nevertheless, the Voting Rights Act does not establish a right of a minority group to elect its representatives in proportion to its population size. See 42 U.S.C. § 1973(b). Rather, the focus of Section 2 is "whether the political process is equally open to minority voters." *Thornburg v. Gingles,* 478 U.S. 30, 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Thus, Section 2 guarantees a fair *process*, not an equal *result.*

There is a present, live controversy in this case--whether the City's at-large election system impermissibly dilutes the votes of Hispanics. The district court concluded that Hispanics have the ability to elect their preferred candidates in the at-large system; that was a determination of the merits. The results of the 1994

election are certainly a factor relevant to whether Hispanics have the ability to elect their preferred candidates in the current system. Those elections results, however, do not affect the *power* of the district court to grant an effective remedy.

This lawsuit would be moot if, for example, Plaintiffs had moved out of Santa Maria or the City had already adopted a district election system. *See Chinese for Affirmative Action*, 580 F.2d at 1009 (claim for injunctive relief requiring multilingual ballots in a particular election was moot after the election was held, but sufficiency of the city's current compliance with Voting Rights Act was a live controversy). But the presence of two Hispanics on the city council does not affect the power of the district court to grant effective relief if Hispanic votes are impermissibly diluted.

Moreover, the relevant inquiry in a vote dilution case is whether a majority bloc *usually* defeats the minority-preferred candidate, not whether a minority candidate is ever elected. In *Gingles*, 478 U.S. at 30, 106 S.Ct. 2752, the authoritative interpretation of a Section 2 claim, the Supreme Court stated that a district court may accord greater weight to minorities' lack of success over the course of several recent elections rather than to their success in one election. *See id.* at 76, 106 S.Ct. 2752.

> Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.

Id. at 57, 106 S.Ct. 2752 (internal citation omitted). Rather than folding the 1994 election results into its analysis of the merits, the district court found those results dispositive as to its continuing jurisdiction. The 1994 election results, which plaintiffs allege "sporadically and serendipitously benefit[ed] minority voters," *id.* at 76, 106 S.Ct. 2752, did not terminate the present, live controversy in this case.

IV. *GINGLES* AND ITS THIRD PRONG

Gingles established a two-step inquiry for analyzing a vote dilution claim. In the first step, a minority group challenging an at-large election system must demonstrate that: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the Section 2 majority[14]] votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." 478 U.S. at 50-51, 106 S.Ct. 2752. In the second step, the district court must decide, based on the "totality of the circumstances," whether the challenged practice impermissibly impairs the ability of the minority group to elect their preferred representatives. *Id.* at 44-45, 106 S.Ct. 2752. The Senate Judiciary Committee produced a list of non-exhaustive factors a court should consider in examining the totality of circumstances.[15]

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[14] *Gingles* reference to a "white majority" voting bloc must be read in the context of the facts presented to the Court. Because Section 2 protects both racial and language minorities, we will refer to the relevant majority voting bloc as the "Section 2 majority."

[15] The so-called "Senate factors" are:

(1) the extent of any history of official discrimination in the state or political subdivision affecting the right of a member of a minority group to register, vote, or participate in the democratic process; (2) the extent to which voting in government elections is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group (for example, unusually large election districts, majority vote requirements, prohibitions against bullet voting); (4) exclusion of minorities from a candidate slating process; (5) the extent to which minority group members in the state or political subdivision bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minorities have been elected to public office in the jurisdiction; (8) the extent to which elected officials are unresponsive to the particularized needs of minorities; and (9) the policy reason for the jurisdiction's use of the challenged practice. *See* S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

The key issue before us is the third *Gingles* precondition. The district court granted summary judgment for Santa Maria, in the alternative, because it found that Plaintiffs could not prove the third *Gingles* prong. Because four Hispanic-preferred candidates were elected in the last four city council elections (a success rate of 50%), the district court concluded that a white majority voting bloc did not usually defeat the Hispanic-preferred candidate. The district court also relied on the projected growth of the Hispanic population in Santa Maria and the availability of single-shot voting to support its conclusion.

Plaintiffs argue that: (1) the election of a Hispanic-preferred white candidate is not as probative as the defeat of a Hispanic-preferred Hispanic candidate; (2) the use of single-shot voting and the changing demographics of Santa Maria are irrelevant to a *Gingles* prong three analysis; and (3) special circumstances surrounded the 1994 election. We agree.

A. Who is the "minority's preferred candidate"?

1.

The Supreme Court has not defined the term "minority's preferred candidate." *See Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. *Gingles* created confusion on this issue because the Supreme Court split on the relevance of the candidate's race in finding racially polarized voting. Racially polarized voting, one of the most important Senate factors, is the combined effect of the second and third *Gingles* preconditions (minority political cohesion and majority bloc voting). *See id.* at 56, 106 S.Ct. 2752; *Romero,* 883 F.2d at 1423. Justice Brennan, writing for a plurality, defined racially polarized voting as a correlation between the race of the voters and the selection of candidates. *See Gingles,* 478 U.S. at 74, 106 S.Ct. 2752. He rejected other factors such as the race of the candidates or voters' racial animosity toward minority candidates as primary determinants of voter behavior. *See id.* at 67-72,

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Factors two and seven are the most important. *See Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752.

106 S.Ct. 2752. Although he noted that minority and majority voters often select members of their own race as their preferred representatives, Section 2 was concerned with "the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate." *Id.* at 68, 106 S.Ct. 2752 (emphasis in original).

Five Justices did not agree. Justice O'Connor wrote for a plurality and Justice White wrote separately to state that the race of the candidate could be relevant in a vote dilution inquiry. *See id.* at 100-01, 106 S.Ct. 2752 (O'Connor, J.); *id.* at 83, 106 S.Ct. 2752 (White, J.). Their position was based, however, on concern that ignoring the race of the candidate as well as other evidence concerning voting preferences would overlook the relevance of partisan affiliation in determining voter behavior.

Although helpful, these various arguments do not address the issue before us: whether a "minority's preferred candidate" may be a non-minority. We only briefly mentioned the issue in *Valladolid,* where we stated that plaintiffs "too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority-preferred candidates." 976 F.2d at 1297; *but see Gomez v. City of Watsonville,* 863 F.2d 1407, 1416-17 (9th Cir. 1988) (discussing the success rate of "Hispanic candidates" in the third *Gingles* prong analysis).

Most circuits have rejected Justice Brennan's position on the lack of importance of a candidate's race[16] and hold that a minority preferred candidate may be a non-minority. *See Lewis v. Alamance County,* 99 F.3d 600, 607 (4th Cir. 1996), *cert. denied,* — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Sanchez v. State of Colorado,* 97 F.3d 1303, 1320 (10th Cir. 1996), *cert. denied,* — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Uno v. City of Holyoke,* 72 F.3d 973, 988 n. 8 (1st Cir. 1995); *NAACP v. City of Niagara Falls, N.Y.,* 65 F.3d 1002, 1016 (2d Cir. 1995) ("Niagara Falls "); *Clarke v. City of Cincinnati,* 40 F.3d 807, 812

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[16] In fairness to Justice Brennan, he did not suggest that only minority candidates could be considered minority-preferred. Rather, his discussion of the irrelevance of a candidate's race was in the context of defining racial polarization.

(6th Cir. 1994); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc); *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1125 (3d Cir. 1993); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("LULAC "). Conversely, a candidate is not minority- preferred simply because the candidate is a member of the minority. *See Lewis*, 99 F.3d at 607; *Harvell v. Blytheville School Dist.* # 5, 71 F.3d 1382, 1386 (8th Cir. 1995); *Jenkins*, 4 F.3d at 1125.

We join our sister circuits in rejecting the position that the "minority's preferred candidate" must be a member of the racial minority. To hold otherwise would, in the words of Judge Cabranes, provide judicial approval to "electoral apartheid." *See Niagara Falls*, 65 F.3d at 1016. "Such an approach would project a bleak, if not hopeless, view of our society -- a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy." *Id.* The minority community may prefer a white candidate just as the white community may prefer a minority candidate. *See Lewis*, 99 F.3d at 607.

2.

We must next determine which candidate in a given election is a minority- preferred candidate. Although this is an issue of first impression in the Ninth Circuit, other Circuits have reached the issue, resulting generally in two very different approaches.

The Second, Fourth, and Sixth Circuits use an objective test that considers which candidate receives the most votes from minority voters. *See id.* at 614; *Niagara Falls*, 65 F.3d at 1018-19; *Clarke*, 40 F.3d at 810 n. 1.

The Third, Eighth, Tenth, and Eleventh Circuits, on the other hand, use variations on a totality of the circumstances theory and require district courts to conduct election specific analyses of anecdotal evidence such as whether minorities mobilized to support the candidate. *See Sanchez*, 97 F.3d at 1321; *Harvell*, 71 F.3d at 1386; *Nipper*, 39 F.3d at 1540; *Jenkins*, 4 F.3d at 1129.

We agree with the Second Circuit that a bright-line rule is the better test. The other approach of "evaluating whether a person is, 'as a realistic matter,' minority-preferred--based on subjective indicators such as 'anecdotal testimonial evidence'--is a dubious judicial task, and one that can degenerate into racial stereotyping of

a high order." *Niagara Falls*, 65 F.3d at 1018. In addition, many of the extrinsic factors relied upon by the courts adopting the totality of the circumstances analysis do not necessarily bear a correlation with how all minority voters feel about a candidate, only how activist groups feel. Whether minority voters mobilized to support a white candidate, a factor considered relevant by the Third Circuit, *Jenkins*, 4 F.3d at 1129, only indicates how those minorities willing to become politically active feel about a candidate; not all minorities may have the time or inclination to take such steps, even though they support that candidate. A bright-line rule, on the other hand, is based on the premise "that the ballot box provides the best and most objective proxy for determining who constitutes a representative of choice." *Niagara Falls*, 65 F.3d at 1019.

In our view, however, the requirement imposed by the Second Circuit that a candidate receive 50 percent or more of the votes cast by a minority group to qualify as minority-preferred can be too restrictive, particularly in a city such as Santa Maria, where all candidates routinely receive fewer than 50 percent of the Hispanic vote. *See* Appendix. Therefore, we hold that a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred. *See Lewis*, 99 F.3d at 614. We also agree with the Second Circuit that "a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election." *Niagara Falls*, 65 F.3d at 1019.

B. Evidentiary weight of election of minority-preferred majority candidate

Plaintiffs do not argue that the district court erred in considering the elections of Urbanske in its third *Gingles* prong analysis. Rather, they contend the district court should have placed less evidentiary weight on Hispanic voters' ability to elect Urbanske, a white candidate, than on their inability to elect a Hispanic candidate.

Few courts have addressed this issue. Our sister circuits have grappled with the question of whether, in a *Gingles* prong three analysis, an election involving only non-minority candidates is relevant and, if so, whether it should receive equal evidentiary

weight as an election in which there is a contest between a minority and non-minority candidate. Most courts hold that a fully non-minority election may be relevant and is admissible to determine whether there is a voting bloc of sufficient power that usually defeats a minority's preferred candidate. An election pitting a minority against a non- minority, however, is considered more probative and accorded more weight. *See Lewis*, 99 F.3d at 608, 610 n. 8 (assuming that white-white elections are entitled to less weight); *Uno*, 72 F.3d at 988 n. 8; *Niagara Falls*, 65 F.3d at 1017; *Nipper*, 39 F.3d at 1540; *Jenkins*, 4 F.3d at 1128; *LULAC*, 999 F.2d at 864.

The general reasoning behind this conclusion is that non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community.

> [T]he most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving [minority] candidates. Certainly, where only white candidates are competing for office in a particular jurisdiction, it is virtually unavoidable that certain white candidates would be supported by a large percentage of ... [minority] voters. Such elections, however, may reveal little about the issue to be determined: the capacity for white bloc voting usually to defeat [minority] candidates of choice. Particularly where voting is extremely polarized by race in elections in which [minority] candidates participate, white-on-white elections in which a small majority (or a plurality) of [minority] voters prefer the winning candidate seem comparatively less important.

Nipper, 39 F.3d at 1540 (internal quotations and citation omitted).

The reasoning behind this rule provides persuasive guidance on the issue before us. For just as a minority vs. non-minority election is more probative of racially polarized voting than a non-minority vs. non-minority election, the inability of Hispanic voters to elect a Hispanic candidate is more probative in a *Gingles*

prong three analysis than the ability of Hispanic voters to elect a non-minority candidate.

The Sixth Circuit alone has addressed this issue. In *Clarke*, the court held that the district court should have examined whether white bloc voting was targeted against black candidates (electoral success rate of 47%), not just against black-preferred white candidates (electoral success rate of 74%). *See* 40 F.3d at 812. The court reasoned:

> When white bloc voting is "targeted" against [minority] candidates, [minority] voters are denied an opportunity enjoyed by white voters, namely the opportunity to elect a candidate of their own race. If [minority] voters nevertheless are able to elect many or most of their preferred candidates who are white, a court that refuses to consider candidate race will be unable to conclude that the white majority votes sufficiently as a bloc to enable it ... *usually* to defeat the minority's preferred candidate.... But the Act's guarantee of equal opportunity is not met when, in the words of Judge Richard Arnold, "[c]andidates favored by [minorities] can win, but only if the candidates are white."

Id. (some internal quotations and citations omitted) (quoting *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D.Ark.) (three-judge panel), *aff'd*, 488 U.S. 988, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988)); *but see Lewis*, 99 F.3d at 610 n. 8 (opining that candidate's race was relevant only in determining whether racial polarization exists, not whether minority-preferred candidates were usually defeated).[17]

The *Clarke* court relied on *Jenkins*, 4 F.3d 1103, and *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), for support. *See Clarke*, 40 F.3d at 812. In *Jenkins*, the court observed that "if the minority community would prefer a minority candidate or believes that a minority candidate would best

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[17] The *Clarke* court ultimately concluded that the third *Gingles* prong was not met because black candidates were not "usually" defeated. *See Clarke*, 40 F.3d at 813.

represent its interests, then § 2 establishes a right on the part of those citizens for their preferred minority candidate to have an equal opportunity to be elected." 4 F.3d at 1128 n. 22. *Gretna* addressed a situation nearly identical to ours:

> In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at- large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference.

834 F.2d at 502.

We believe this reasoning is persuasive and hold that, in a multi-seat, multi-vote election, the ability of the minority to elect a non-minority candidate is not as probative in a *Gingles* prong three analysis as the inability of the minority to elect a minority candidate. To hold otherwise would doom any Section 2 claim in which white candidates, acceptable to minorities and non-minorities alike, are regularly elected but in which minority candidates, preferred by minorities but unfavored by whites, are consistently defeated. Our rule furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to "elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). The Act means more than securing minority voters' opportunity to elect whites.[18]

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[18] Our rule does not contravene the Voting Rights Act's prohibition against proportional minority representation. See 42 U.S.C. § 1973(b). The election of minority-preferred white candidates is relevant to determining the degree of racially polarized voting in a community. We recognize "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever

The district court erred in applying a simple mathematical approach -- counting the number of successful Hispanic-preferred candidates divided by the number of elections -- in its *Gingles* prong three analysis. This mechanical approach failed to fulfill the district court's duty to make "a searching practical evaluation of the past and present reality" with "a functional view of the political process." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (internal quotations omitted) (citing S.Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208). The reality facing Hispanic voters in Santa Maria in the 1988, 1990, and 1992 elections was a choice of one Hispanic candidate and several non-Hispanic candidates for two council seats. In those elections, Hispanic voters preferred the lone Hispanic candidate and, unavoidably, one of the remaining non-Hispanic candidates. The Hispanic candidate came in last while Urbanske, a Hispanic-preferred candidate, won in 1988 and 1992. *See Gingles*, 478 U.S. at 60-61, 106 S.Ct. 2752 (district court properly considered "the very different order of preference blacks and whites assigned black candidates"). The success of a Hispanic-preferred candidate like Urbanske does not necessarily demonstrate that Hispanics have an equal opportunity to participate in Santa Maria city council elections. Rather, it may simply show that, at least historically, Hispanics have been relegated to casting a veto between majority-preferred white candidates.

On remand, the district court should consider the elections of Urbanske in 1988 and 1992 in determining whether racial bloc voting exists in Santa Maria. The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight. The district court should also consider the order of preference non- Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates. Only then

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race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). When non-minority voters may elect their chosen representatives who are non-minorities, but minority voters cannot elect their chosen minority representatives, equal opportunity to elect is not achieved.

can the district court determine whether a Section 2 majority bloc voting usually defeats Hispanic voters' candidates of choice.

C. The relevance of other factors to Gingles' third precondition

The district court also considered the use of single-shot voting and the growth of the Hispanic community in Santa Maria in its grant of summary judgment for the City on Gingles prong three. That consideration is misplaced.

Under the City's present at-large election system, a Hispanic voter may vote for one or two candidates in a multi-seat election; the district court agreed with the City that this system "provides the greatest opportunity" for Hispanics to elect a preferred candidate. While we question the factual accuracy of this statement,[19] we hold that the mere ability to bullet vote does not eliminate a triable issue regarding whether minority- preferred candidates are usually defeated.

The ability of minority voters to bullet vote does not remedy a vote dilution injury. When a court finds an inference of vote dilution because the plaintiffs proved the three *Gingles* preconditions, the court may consider the presence of an "anti-single-shot" provision in its "totality of the circumstances" inquiry. *See Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (quoting Senate Report factor three). Although we have recognized that bullet voting concentrates minority voting power on select candidates and withholds minority votes from majority candidates, *see Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992), we have never stated

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[19] As of 1994, Hispanics comprised only 28.7% of the voting age citizen population in Santa Maria. Even if all Hispanic eligible voters voted for the same Hispanic candidate, those total votes could conceivably not be enough to ensure election. *See Sanchez*, 97 F.3d at 1319 (*Gingles* does not require an absolute monolith in the white or Hispanic bloc vote). The 1990 city council election is illustrative. The Hispanic candidate received 66.2% of the Hispanic vote but finished last in a field of five. Only a combined total of 21.5% of Hispanics voted for the two winning white candidates. Each of the third- and fourth-place candidates received more Hispanic votes than the two winners. Obviously, bullet-voting would not have been effective.

that vote dilution is solved by the absence of an anti-single-shot provision. Indeed, no court has affirmatively required minority voters to bullet vote to elect their preferred candidates.

Whatever relevance the existence of an "anti-single-shot" provision has in a "totality of the circumstances" inquiry, it is simply insufficient to sustain summary judgment on *Gingles* prong three for the City.[20]

The district court also erred in including the growing Hispanic population in its *Gingles* prong three analysis. First, the third *Gingles* prong asks a predominantly historical question – that is, whether the Section 2 majority bloc usually defeats the minority's preferred candidates. *See Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. This question is answered by evaluating past election results. Neither the growth of the minority community during these past elections nor its projected growth is relevant to finding racially polarized voting in a jurisdiction. Dramatically changing demographics become relevant only when the court finds the three *Gingles* preconditions met and considers the totality of the circumstances.

Second, a finding of vote dilution "depends upon a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (internal quotations omitted). Nevertheless, "[t]he ultimate question in any section 2 case must be posed in the present tense, not the past tense." *Uno*, 72 F.3d at 990. Past elections may be less probative of vote dilution than more recent elections. *See id.; see also Aldasoro v. Kennerson*, 922 F.Supp. 339, 373 (S.D.Cal. 1995) (Hispanics presently have the ability to elect at-large). At the same time, the court must decide whether the current system actually dilutes the minority vote, not whether it may potentially aid minority voters. *See Jenkins*, 4

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[20] The City argues that bullet-voting bestows as much voting power to Plaintiffs in an at-large system as in a district system because, under a district system, Plaintiffs would be entitled to cast only one vote every four years. By bullet voting under the current system, Plaintiffs may cast one vote every two years. Plaintiffs' claim is not concerned with the number of votes cast. Rather, Plaintiffs' claim focuses on the equal voting of all Santa Maria voters. A district system would require all voters to cast an equal number of ballots in the same period.

F.3d at 1123. A court may not refuse to fashion a remedy after a claim of vote dilution is established based simply on its belief that the vote dilution injury will be solved in the future by changing demographics.

On remand, if the district court finds the three *Gingles* preconditions met and engages in a "totality of the circumstances" analysis, the proper inquiry is whether changing demographics demonstrate that Hispanics presently have the ability to elect at-large, not whether they will have this ability in the future.

D. The "special circumstances" doctrine

Plaintiffs argue that the success of two Hispanic candidates in 1994 was attributable to special circumstances and therefore should have been discounted or ignored by the district court in its *Gingles* prong three analysis. The district court found that Plaintiffs failed to submit any evidence that non-Hispanics voted for, endorsed, or financially supported the Hispanic candidates in an effort to defeat the lawsuit, and thus the special circumstances doctrine did not apply. Plaintiffs concede that they have no direct evidence of a conspiratorial intent by whites to elect Hispanic candidates to thwart the lawsuit.[21]

The "special circumstances" doctrine was enunciated in *Gingles,* where the Court stated that minority success in elections infected by special circumstances should not be counted or emphasized in a prong three analysis. 478 U.S. at 51, 106 S.Ct. 2752. This is because isolated minority success is distinct from the "usual predictability" of majority success present in a vote dilution claim. *Id.* Examples of special circumstances are: the absence of an opponent; incumbency; utilization of bullet voting; or the pendency of the instant lawsuit. *See id.* at 57, 106 S.Ct. 2752. When those circumstances are present, voters may behave differently than they would otherwise -- as such, that election is not probative of whether a Section 2 majority voting bloc *usually* defeats the minority's preferred candidate.

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[21] Plaintiffs deposed most of the principal politicians or local leaders who endorsed or campaigned for Centeno and Maldonado. All professed reasons for their actions unrelated to the plaintiffs' pending lawsuit.

The *Gingles* Court devoted the greatest attention to the special circumstance of minority success in an election during the pendency of litigation challenging the existing system. In such a situation, the district court "could properly consider to what extent the pendency of this very litigation [might have] worked a one-time advantage for [minority] candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting." *Id.* at 76, 106 S.Ct. 2752 (internal quotations and citation omitted). A plain reading of *Gingles*, however, does not compel the conclusion that plaintiffs must submit evidence that white leaders manipulated an election with the intent to thwart a vote dilution lawsuit. The Court stated that a district court should cautiously view minority electoral success achieved after a vote dilution lawsuit is filed. *See id.* The Court then stated several reasons why these minority successes might be unrepresentative of usual voting patterns: white politicians "might" apprehend that the election of a minority candidate would be politically expedient or "might" believe that the election of a minority candidate would thwart the lawsuit. *Id.* at 76 n. 37, 106 S.Ct. 2752 (quoting *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973)). The Court did not hold that, to invoke the special circumstances doctrine, plaintiffs *must* prove that white politicians are motivated by an intent to thwart the lawsuit or other racist reasons.

Nevertheless, several courts seem to have interpreted *Gingles* that way. In *Valladolid,* we found that plaintiffs' special circumstances argument failed because plaintiffs had submitted no other election results in support of the third *Gingles* requirement. 976 F.2d at 1297-98. We noted, in dictum, that the special circumstances doctrine did not apply because plaintiffs had "adduce[d] no evidence that the pendency of litigation in 1988 led to unusual support for minority-preferred candidates by whites seeking to maintain the at-large system." *Id.* at 1298; *see also Aldasoro*, 922 F.Supp. at 376 (no evidence that Hispanic candidate won because of unusual, organized white support or endorsement or because whites wanted to secure the dismissal of the lawsuit). The Second Circuit rejected plaintiffs' attempt to portray a minority candidate's election -- due to the candidate's outstanding credentials and popularity -- as surrounded by special circumstances. *See Niagara Falls*, 65 F.3d at 1021 n. 22. The court found this argument "absurd" and noted the absence of evidence indicating an attempt

by white voters to thwart the pending lawsuit. *See id.* at 1021. Recently, the Eleventh Circuit concluded that individual decisions to appoint minorities to the city commission or Board of Education were not attempts "to avoid the reach of the Voting Rights Act or to manipulate the instant case in any way." *Askew v. City of Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997). The court emphasized, however, that voting behavior, not racist voting motivation, was the central inquiry in a Section 2 case. *See id.*

The Fourth Circuit has directly ruled on this issue. "[T]he absence of a conspiracy or an intent to moot this litigation does not end the district court's inquiry. The court should probe further to determine whether the [minority] candidate's success ... while this action was pending, resulted from unusual circumstances." *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987).[22] In *Collins*, two black city council members were elected for the first time in city history. The mayor had, for the first time, supported a second black candidate and had publicly stated that the election might moot the issue of black representation. See id. The court held that the proper focus was the voting patterns that resulted from the mayor's conduct and statement, not the mayor's intent or a conspiracy by whites. *See id.* Thus, the Fourth Circuit requires proof of unusual circumstances, such as unusual white support for a minority candidate, not that the unusual circumstances resulted from an intent to thwart the lawsuit.

We are convinced this approach is sound and consistent with the overall purpose of the Voting Rights Act. An intent requirement has been rejected in other contexts of the Act. In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the Supreme Court departed from its prior cases and held that plaintiffs must prove purposeful discrimination in a vote dilution claim under the Act. *See id.* at 66-67, 100 S.Ct. 1490. Congress

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[22] Contrary to the City's argument, *Collins* has not been implicitly overruled. In *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989) ("Collins II"), the court affirmed the district court's finding that the recent re-election of black candidates was attributable to special circumstances. *See id.* at 1243. *Lewis* affirmed *Collins II's* central holding regarding the inquiry to be undertaken to determine who is the minority-preferred candidate but declined to extend it. *Lewis*, 99 F.3d at 612, 614.

swiftly amended Section 2 with the express purpose of repudiating the "intent test" because it was "unnecessarily divisive [in that] it involve[d] charges of racism on the part of individual officials or entire communities," it placed an "inordinately difficult burden of proof on plaintiffs," and it asked "the wrong question." *Gingles*, 478 U.S. at 44, 106 S.Ct. 2752 (internal quotations omitted) (quoting S. Rep. at 36, 1982 U.S.C.C.A.N. at 214). Instead, the "results test" asks the right question -- whether minorities have equal opportunity to participate in the political processes or to elect their chosen candidates as a result of a challenged practice or structure. *See id.* (quoting S. Rep. at 28, 1982 U.S.C.C.A.N. at 206).

Also, we rejected an "intentional discrimination" standard of proof when a district court considers the first Senate factor--the history of official discrimination in a state or political subdivision. *See Gomez*, 863 F.2d at 1418. We noted that Congress amended Section 2 to relieve plaintiffs of the burden of proving such intent. Although intentional discrimination may be relevant to a vote dilution claim, we held that plaintiffs need only focus on the results of official discrimination. *See id.* Thus, it seems clear that requiring proof of intentional discrimination or racist motives in any part of a vote dilution claim "diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives." S. Rep. at 18, 1982 U.S.C.C.A.N. at 177.

We hold that proof of groupwide or individual discriminatory motives has no part in a vote dilution claim. To invoke the special circumstances doctrine regarding an election that occurred after a Section 2 lawsuit is filed, plaintiffs must show that a particular election was surrounded by unusual circumstances. Those unusual circumstances must demonstrate that the election was not representative of the typical way in which the electoral process functions. The focus is voter behavior, not voter motivation.

This rule parallels the policies set forth in *Gingles* for rejecting the "intent test." First, it removes the requirement that plaintiffs not only brand but prove that white voters, organizations, or leaders are racists or motivated by racist ambitions. "Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community"--a result clearly antithetical to the purpose of a statute meant to engender racial harmony. *Gingles*,

478 U.S. at 72, 106 S.Ct. 2752 (internal quotation omitted) (quoting S. Rep. at 36, 1982 U.S.C.C.A.N. at 214 (testimony of Dr. Arthur S. Flemming, Chairman of U.S. Comm'n on Civil Rights)). Second, it eliminates an inordinately difficult burden of proof from plaintiffs. As this case demonstrates, it is virtually impossible to find evidence that white politicians or community groups conspired to manipulate an election to ensure the victory of a minority candidate. Rarely would these individuals admit to such a motive. We cannot even begin to imagine how plaintiffs could prove that thousands of individual voters cast their ballots intending to thwart the lawsuit. A thousand voters may vote for a particular candidate for a thousand different reasons; a discriminatory motive may only be a subconscious thought of the voter. Third, our rule asks the right question--whether a particular election was surrounded by unusual circumstances such that its results are not reliable indicators of typical voting behavior. Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority's preferred candidate.

Finally, our rule avoids an argument implicit in proof of intent to thwart a pending lawsuit--that somehow the victorious minority candidate was unqualified and elected only because of white manipulation. We strenuously reject any invitation to disparage the credentials of any candidate running for public office.[23] That is what happened in this case, in which the City argued in its brief that the Hispanic candidates who lost before 1994 "were weak candidates who would have lost even if they were white."[24] It would be a disservice to both the individual candidates and the goals of the Voting Rights Act for federal courts, years after an election, to scrutinize the qualifications of minority candidates who run for public office in jurisdictions with historically

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[23] *See, e.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (minority electoral success after pending litigation "could lead white voters to throw the minority a bone").

[24] Plaintiffs made similar arguments by labeling Maldonado as unqualified.

white-only officeholders. Arguments regarding a candidate's qualifications for office are saved for the voters in an election. We reject any rule that would require the parties to cast aspersions on the qualifications of the victorious or defeated minority candidates.

Here, Plaintiffs submitted evidence that several aspects of the 1994 city council election were unprecedented: the percentages of non-Hispanic crossover voting for two Hispanic candidates; the endorsements of several white politicians and predominantly-white organizations for those candidates; the amount of financial support contributed by non-Hispanic businesses and individuals to those campaigns; and the amount that Maldonado spent on his campaign. It was well-known throughout Santa Maria that the district court was awaiting the results of that election. Days before the election, Maldonado told a local newspaper that his victory would prove "Santa Maria is not racist." Plaintiffs have raised a triable issue of fact in whether the 1994 city council election was representative of typical voting behavior in Santa Maria. At trial, if Plaintiffs prove that unusual circumstances surrounded that election, the district court must discount the election results in its *Gingles* prong three analysis.

V. STRICT SCRUTINY

Finally, the district court based its grant of summary judgment for the City on its determination that any relief provided to Plaintiffs would not survive strict scrutiny. If the district court determines that Santa Maria's at-large election system impermissibly dilutes the Hispanic vote, it may order the creation of a district system. The creation of new districts must be reasonably compact, "taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries...." *Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941, 1960, 135 L.Ed.2d 248 (1996). As the Supreme Court recently emphasized, strict scrutiny applies if race is the predominant motive in redrawing district lines. *See Abrams v. Johnson*, 521 U.S. 74, —, 117 S.Ct. 1925, 1936, 138 L.Ed.2d 285 (1997). The Court has assumed that compliance with Section 2 can be a compelling state interest. *See Bush*, at 978, 116 S.Ct. at 1960- 61; *Miller v. Johnson*, 515 U.S. 900, 921, 115 S.Ct. 2475, 2490-91, 132 L.Ed.2d 762 (1995).

The district court's consideration of the scrutiny required for a possible future remedy was premature. Before the court concerns itself with strict scrutiny, it first must find that Plaintiffs have proved the three *Gingles* preconditions, that the totality of the circumstances shows that the Hispanic vote is diluted, that a district system would remedy the injury, and that race is the predominant factor in drawing district lines. Raising the strict scrutiny issue in its analysis of the third *Gingles* requirement was erroneous.

VI. CONCLUSION

Accordingly, we reverse the dismissal of the case as moot, the grant of summary judgment for the City on the third *Gingles* precondition, and the denial of summary judgment for Plaintiffs on the first *Gingles* precondition. We take no position as to whether Plaintiffs may establish any of the three *Gingles* requirements. Plaintiffs, of course, are not required to *prove* any of the three preconditions in opposing a motion for summary judgment; they need only show a genuine dispute of material fact. The district court must consider a motion for summary judgment or the merits at trial under the legal rules established here.

REVERSED AND REMANDED.

APPENDIX

Estimated Percentages of Votes Cast
by Non-Hispanic and Hispanic Voters
in Santa Maria Elections

H-Hispanic Candidate

E-Elected

Overall finish	*Non-Hispanic*	*Hispanic*
	1988 City Council Election	
Urbanske (E)	61.4	49.5
Firth (E)	46.7	4.2
Snyder	34.6	27.4
Martel (H)	15.7	45.6
	1990 Mayoral Election	
Hobbs (E)	71.4	13.3
Rodenberger	16.9	15.8
Lopez (H)	6.6	42.6
Castillo (H)	5.1	28.3
	1990 City Council Election	
Tunnell (E)	49.0	12.8
Orach (E)	48.4	8.7
Engel	27.2	23.1
Droegemeier	26.3	20.5
Guevara (H)	8.6	66.2
	1992 City Council Election	
Urbanske (E)	50.4	38.4
Miyoshi (E)	35.5	31.5
Firth	36.4	-4.7
Varni	28.3	12.8
Anderson	12.1	22.1
Jerger	13.3	-1.1
Castillo (H)	4.7	35.9

1994 City Council Election

Centeno (E) (H)	35.2	39.8
Maldonado (E) (H)	26.1	65.4
Orach	42.2	1.1
Benedetti	24.2	4.0
Minami	9.4	22.3
Chenoweth	11.4	-1.6
Guevara (H)	1.9	31.6
Hollister	10.4	-1.2
Hosepian	5.5	3.1
Walker	3.2	10.6
Hunt	3.6	2.8
Watson	1.9	4.2

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I join the majority opinion except as to parts IV.B. and IV.D., to which I respectfully dissent.

I

In part IV.B., the majority holds that "[t]he defeat of Hispanic-preferred Hispanic candidates ... is more probative of racially polarized voting and is entitled to more evidentiary weight" than is the election of Hispanic-preferred non-Hispanic candidates. Maj. Op. at 554. The majority has argued logically for its position -- and it is not without weight. On balance, however, I cannot accept the majority's analysis.

What the majority has done is to dictate to the district court the weight that is to be given to different and perhaps contradictory pieces of evidence. Yet, the weight to be assigned to evidence is strictly within the province of the trier of fact, not the court of appeals. *See, e.g., Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 856-58, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993).

By usurping this role, the majority forecloses the possibility that the district court, after considering the evidence submitted in the case and the credibility and demeanor of testifying witnesses, may find that, in the circumstances of this case, the defeat of minority-preferred candidates is not as probative as the election of minority-preferred non-minority candidates.

The problem with an appellate court dictating the relative weight to be accorded to evidence is aptly illustrated by the majority's holding. What does it mean that one electoral result is to be given "more" weight than another? Is the defeat of one minority-preferred minority candidate equal in evidentiary weight to the election of two minority-preferred non-minority candidates? Or three? The majority cannot answer this question in anything more than an arbitrary fashion, precisely because the assigning of weight to evidence is properly left to the trier of fact.

Even if it were appropriate to dictate the weight to be placed on the evidence, I am still not persuaded that the majority's approach is correct. I would determine the level of polarization by considering the success or failure of minority-preferred candidates – regardless of race – who are not preferred by the majority. Thus, if the minority prefers candidate X and the majority does not, the defeat of candidate X would be probative of polarization regardless of his or her race.

Under the majority's approach, on the other hand, the weight to be accorded to the defeat of candidate X depends on candidate X's race. There is considerable tension between part IV.B. and our holding in part IV.A.1. that the race of the candidate is irrelevant to determining who is the minority- preferred candidate. We are in agreement that "[t]he minority community may prefer a white candidate just as the white community may prefer a minority candidate." Maj. Op. at [13a]. Yet, the majority implicitly holds in part IV.B. that a minority-preferred minority candidate is *more* preferred than a minority- preferred non-minority candidate, merely because of his or her race. By elevating minority-preferred minority candidates to this higher status, the majority embraces the very view of "electoral apartheid" that it rejects in part IV.A.1. *See* Maj. Op. at [13a].

II

I am also unable to join part IV.D., in which the majority holds that the "special circumstances" doctrine does not require a showing that white voters or politicians acted in the election in question with an intent to thwart the voting rights lawsuit. The majority holds that Ruiz has raised a triable issue of fact as to whether the 1994 election was representative of typical voting pattern in Santa Maria. Maj. Op. at [25a-26a].

This appeal does not require that we establish the framework for deciding when special circumstances surround a given election. In part III., we hold that the district court erred in holding that Ruiz's lawsuit had been mooted by the 1994 election. Thus, on remand, the district court may not rule in favor of the City merely based on the 1994 election. The factors that the majority identifies as demonstrating a triable issue of fact as to the special circumstances doctrine--the percentage of crossover voting, the endorsements of and financial support from nonminorities, and the

lawsuit itself--are ones that would enter the district court's ultimate *Gingles* inquiry. Thus, I would not reach this issue.

HAWKINS, Circuit Judge, concurring in part and dissenting in part:

I join the majority in all but part IV.A.2 of the Opinion. In a perfect world in which racial discrimination did not exist and its vestiges did not remain, each racial and ethnic community and interest group would need to "pull, haul, and trade to find common political ground." *Johnson v. De Grande*, 512 U.S. 997, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We are not there yet. Instead, we live in a world in which political participation and opportunity are simply not equally available to a member of every race. To eradicate those voting practices with discriminatory results that "perpetuate the effects of past purposeful discrimination," Congress passed the Voting Rights Act, and federal courts enforce it. *See* S.Rep. No. 97-417, 97th Conga., 2d Sees. (1982), *reprinted* in 1982 U.S.C.C.A.N. 117, 218. In fulfilling our duty, we should be less concerned with creating bright-line rules and more dedicated to accomplishing justice for the parties.

The only virtue of the majority's bright-line rule is simplicity. "Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns," *Westwego Citizens for Better Government v. City of Westwego,* 872 F.2d 1201, 1203 (5th Cir. 1989) (citation omitted), the court should not resort to unyielding rules to decide these cases.

That is the defect inherent in the adoption of a strict bright-line rule. It is a "shortcut" that "fall[s] prey to the myopic presumption there is a minority preferred candidate in any race in which the minority votes." *Sanchez v. Colorado*, 97 F.3d 1303, 1320 (10th Cir. 1996). This rule prevents the district court from analyzing the historical environment and current choices facing minority voters. The result here is to confer "minority- preferred candidate" status even on those candidates who were the "least disfavored" among many disfavored candidates by minority voters.

A better approach is that adopted by the Third and Tenth Circuits which involves a "detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice." *Jenkins v. Red*

Clay Consol. School Dist., 4 F.3d 1103, 1129 (3d Cir. 1993); *see Sanchez*, 97 F.3d at 1321. This flexible approach considers four non-exhaustive factors: minority sponsorship of a candidate; the candidate's attention to minority issues or the minority community; the rate of minority turnout; and disincentives for minorities to run for office. *See Jenkins*, 4 F.3d at 1129. Only through such a searching inquiry can the district court best analyze the true choices facing minority voters and decide the extent of racially polarized voting under the third prong of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

The danger of a "one-size-fits-all" bright-line rule is its unyielding rigidity and insensitivity to the particular facts of a voting rights case. The rule adopted by the majority here is by far the most unforgiving, absolute rule adopted by any circuit to consider the issue. Even those circuits which have adopted some form of a bright-line rule allow some factual inquiry into the "minority-preferred candidate's" support from minority voters. The Second Circuit, for example, sets a 50% minority-support threshold before considering a candidate "minority preferred." *See NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1019 (2d Cir. 1995). The Fourth Circuit, while presuming that a candidate who receives less than 50% of the minority vote but who would have won if the election were held only among minority voters is "minority preferred," nevertheless requires "an individualized assessment ... in order to confirm that such a candidate may appropriately be so considered." *Lewis v. Alamance County*, 99 F.3d 600, 614 (4th Cir. 1996), cert. denied, — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997). This prevents a candidate with tepid minority support from being considered in a *Gingles* prong three analysis. The majority's elimination of the 50% requirement opens the door for candidates only marginally favored by minority voters to count in the *Gingles* equation.

What makes the majority's adoption of this bright-line rule all the more surprising is that it is unnecessary to decide this case. The parties have hotly disputed nearly every issue from mootness to the special circumstances doctrine; the only thing they seem to agree on is that Tom Urbanske was a Hispanic-preferred candidate in 1988 and 1992. For each of the elections studied in this lawsuit, there is no dispute on this record as to the identity of the minority-preferred candidate. The rule the majority adopts today re-

solves nothing for these parties and adds nothing to the disposition of this particular case.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI
(Central California)

ORDER

FILED FEBRUARY 23, 1999

Before: WALLACE, TROTT, and HAWKINS, Circuit Judges.

Judge Wallace favored a rehearing as to parts IV.B and IV.D of the majority Opinion but voted to deny the petition for rehearing as a whole and recommended rejection of the suggestion for rehearing en banc. Judges Trott and Hawkins voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI
(Central California)

ORDER

FILED MARCH 15, 1999

Before: WALLACE, TROTT, and HAWKINS, Circuit Judges.

Appellees' Rule 41(b) Motion to Stay Issuance of the Mandate to Allow Time for Filing of Petition for Writ of Certiorari is GRANTED. The mandate is stayed for 30 days from the filed date of this Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, et al.,

Plaintiffs,

v.

CITY OF SANTA MARIA, et al.,

Defendants

CV 92-4879 JMI (SHx)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP 12 (b)(1) AND MOTION FOR SUMMARY JUDGMENT

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO STRIKE

FILED SEPTEMBER 3, 1996

IT IS HEREBY ORDERED:

Defendants CITY OF SANTA MARIA, et al.'s Motion to Dismiss or in the Alternative Motion for Summary Judgment and Plaintiffs ESPERANZA RUIZ, et al.'s Motion for Partial Summary Judgment have came before this Court for review. Upon careful consideration, the Court hereby GRANTS Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), and, in the alternative, GRANTS Defendants' Motion for Summary Judgment; and DENIES Plaintiffs' Motion for Partial Summary Judgment. The Court also GRANTS Plaintiffs' Ex Parte Application to Strike Appendix B from Santa Maria's Reply.

BACKGROUND

Plaintiffs are four Hispanic residents of the City of Santa Maria. In sum, they allege that Defendant City of Santa Maria's at-large system of electing members of the city council and mayor violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. According to Plaintiffs, the 1990 census allegedly established that the Hispanic population of Santa Maria constitutes a majority in a single member district. The Plaintiffs allege the Anglo community votes as a bloc to defeat Hispanic candidates preferred by the Hispanic community and that the Defendant City deliberately maintains an at-large election system to dilute the Hispanic vote.

The City of Santa Maria's November 1994 election resulted in two Hispanic candidates, namely Joseph Centeno and Abel Maldonado, being elected to Santa Maria's city council.[1] Upon consideration and review of these election results, the Court sent an Order to Show Cause ("OSC") to the parties stating that, based on the 1994 election results, it "[c]oncluded that the Hispanic population in the City of Santa Maria has the ability to elect council members under the current at-large election system. Thus, the Court believes that a claim of vote dilution is now moot." See Order To Show Cause Why The Court Should Not Dismiss This Case As Moot ("Order To Show Cause"), filed October 24, 1995.

Before dismissing this action, the Court permitted the parties to brief the issue as to whether in fact this case has been rendered moot by the 1994 election results.[2] Defendants' response to the Court's OSC included a motion for summary judgment. The Court calendared this summary judgment motion in order to permit the parties to reply to the OSC responses filed by each side. Plaintiffs have since also moved the Court for partial summary judgment in this action.

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1 Hispanics now hold two of the four council seats and will continue to hold at least two seats through 1998.

2 The Court vacated the then current trial date of November 7, 1995 as well as cancelled the pre-trial conference set for Friday, October 27, 1995. The Court's Order stated that if it determines that the trial will go forward, a new trial schedule will be forthcoming.

DISCUSSION

I. DEFENDANTS' MOTION TO DISMISS

A. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants' response to the Court's OSC moved the Court to dismiss this action as moot under Federal Rules of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), 12(b)(6) ("Rule 12(b)(6)") and 56 ("Rule 56"). While Defendants acknowledge that motions to dismiss for mootness generally are brought under Rule 12(b)(1) for a finding that the Court lacks subject matter jurisdiction over the matter at issue, they also assert that some mootness motions are brought as Rule 12(b)(6) motions to dismiss for failure to state a claim.

The Court finds that a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is, as Defendants concede, the most appropriate and common determination of a mootness question.

1. The Court Sua Sponte Raised The Mootness Question

The Court sua sponte raised the issue of mootness in this action. See Order To Show Cause. As this Court is one of limited jurisdiction and because mootness goes to a federal court's subject matter jurisdiction under Article III of the Constitution, the court's OSC was proper. DeFunis v. Odegaard, 416 U.S. 312, 315-16 (1974); Canez v. Guerrero, 707 F.2d 443, 446 (9th Cir. 1983).

2. Burden of Proof Lies With Plaintiffs

A contentious issue between the parties is which party has the burden of proof in establishing subject matter jurisdiction. Plaintiffs argue that because Defendants raised the issue of mootness, Defendants must carry the burden of proving lack of subject matter jurisdiction. Plaintiffs, however, incorrectly state that the Defendants raised the mootness issue. As discussed above, this court raised the mootness issue. See Order To Show Cause. Thus, as with any determination of subject matter jurisdiction not raised by defendant, Plaintiff bears the burden on the issue of mootness in this action. Kokkonen v. Guardian Life Ins. Co. of America, 114

S. Ct. 1673 (1994); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (party invoking federal jurisdiction bears the burden of establishing it); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

3. Extrinsic Evidence May Be Considered By The Court

In determining whether this case is moot, the Court has been presented with and reviewed the results of the Defendant City of Santa Maria's November 1994 election results. As Defendants relate, in ruling on a Rule 12(b)(1) motion for dismissal for lack of subject matter jurisdiction, the district court "is not restricted to the face of the pleadings but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert.denied, 489 U.S. 1052 (1989).[3] Findings of fact and conclusions of law are unnecessary. Wilson v. State of Nevada, 666 F.2d 378, 380 n.2 (9th Cir. 1982). Thus, the Court has properly considered the 1994 election results in determining whether subject matter jurisdiction exists in the instant action.

B. MOOTNESS

1. No Effective Relief Can Presently Be Granted By This Court

Ninth Circuit cases establish that the legal test for determining mootness is whether 'events have occurred that prevent [the Court] from granting effective relief." Canez, 707 F.2d at 446. A case is moot "when the issues presented are no longer 'live' or the

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[3] This is unlike the standard employed for a Rule 12(b)(6) determination. In deciding a Rule 12(b)(6) motion for dismissal for failure to state a claim, the court may only consider matters within the pleadings. Levine v. Diamanthuest, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (citing North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). "If, on a [12(b)(6)] motion . . . for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

parties lack a legally cognizable interest in the outcome." Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)). The basic question is whether there exists a present controversy as to which any effective relief can be granted. Id. Thus, if the Court finds that the results of the November 1994 election preclude it from granting effective relief to Plaintiffs in this action, the Court should grant Defendants' motion.

This action is brought under Section 2 of the Voting-Rights Act of 1965 ("VRA"), alleging a vote dilution claim which challenges the at-large system of election of the Santa Maria city council and mayor. Vote dilution occurs when a minority group is unable to elect candidates at-large whom it could elect within a single member district where the group is a majority. See Thornburg v. Gingles, 478 U.S. 30, 68 (1986); 42 U.S.C. § 1973.

Plaintiffs requested relief is for this Court to dismantle the current at-large system and replace it with single-member districts. Looking beyond the specific system requested, the Court notes that Plaintiffs' reason for bringing this action is the desire to elect Hispanic preferred candidates; in essence, arguing that under the current at-large system of election they are unable to elect Hispanic council members. As stated, if the Court finds that the requested relief – electing Hispanic preferred candidates – has already occurred under the current system, then the Court is precluded from granting Plaintiffs any effective relief in this action.

The recent election has resulted in two Hispanics being elected to the city council, who will serve on the council until after the 1998 election. Defendants assert that the 1994 election results render moot Plaintiffs' claim of vote dilution. However, as this is the first time in the city's history that Hispanics have been elected to the city council, Plaintiffs contend that the special circumstances doctrine applies to these recent election results and thus the results do not render this action moot. As set forth below, the Court has determined that the special circumstances doctrine does not apply to the 1994 election. Thus, in accordance with recent U.S. Supreme Court decisions, the Court finds that there is currently no effective relief that can be granted to Plaintiffs, as there is no injury at the present time.

a) Any relief granted would not pass the requisite strict scrutiny analysis

Continuously over the past several years, the U.S. Supreme Court has made clear that all race-based government decision-making, whether federal, state or local, is subject to strict scrutiny under the Fourteenth Amendment's equal protection clause. Shaw v. Hunt, 1996 WL 315870 (U.S.); Miller v. Johnson, 115 S. Ct. 2475 (1994); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). "A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. (internal citations omitted). This is true whether or not the reason for the racial classification is benign or the purpose remedial." Shaw v. Hunt, 1996 WL 315870, at *3 (U.S.) (citations omitted).

Santa Maria's electoral system is authorized by state law, indeed until 1955 general law cities were required by state law to elect at-large. Section 2 of the VRA authorizes a Court to impose an alternative system if its finds that a plaintiff has presented a viable claim of vote dilution. However, for a federal district court to order that a state approved electoral system be dismantled is extremely intrusive. Thus, only upon a finding of a compelling reason should this Court become involved in dismantling Santa Maria's electoral system.

With two Hispanics now in office, the Court finds that a compelling reason does not exist for the Court's interference with the current election system of Santa Maria. Plaintiffs' proffered single-member districting scheme is not narrowly tailored and thus would not pass strict scrutiny analysis.

2. Plaintiffs Have Not Proved That "Special Circumstances" Existed in the 1994 Election

Plaintiffs contend that the special circumstances doctrine applies to the recent election results and thus the results do not render this action moot. The U.S. Supreme Court in Thornburg held that an isolated minority success should be given less probative value if explained by "special circumstances." Thornburg, 478

U.S. at 57. The special circumstances doctrine, when such circumstances apply, requires courts to ignore or give less weight to elections that resulted in minority success. Special circumstances are occurrences that are markedly different from previous elections and that make the success unrepresentative of most elections, in which minority candidates usually lose. Id. at 75-76.

Plaintiffs argue that the 1994 election should be disregarded in determining whether racially polarized voting exists in Santa Maria. Plaintiffs contend that unusual circumstances existed during the 1994 elections which resulted in Hispanics being elected for the first time. Specifically, Plaintiffs claim that the Hispanic candidates elected received endorsements and monetary support that would not have been received save for the existence of this lawsuit. See Plaintiffs' Response to Order to Show Cause and Offer of Proof, pp. 10-12. Plaintiffs argue that the City was aware of this action and backed these candidates in order to prevent any showing of discrimination.[4]

Plaintiffs, however, have failed to present the Court with evidence showing that any acts were done to defeat the instant lawsuit. In fact, Plaintiffs concede that there is no evidence in this case that Anglos voted for Maldonado and Centeno in order to secure dismissal of the lawsuit, or Anglos gave money or endorsed them for that purpose. See Defendants' Statement of Uncontroverted Facts, ¶¶ 19-21. Plaintiffs contend that they do not have to prove intent, however, without even the slightest bit of evidence showing a connection between the donations and endorsements and this lawsuit, Plaintiffs' arguments cannot defeat the Court's finding that special circumstances doctrine does not apply to this case.

3. None of the Exceptions to the Mootness Doctrine Apply

Plaintiffs also contend Defendants must show that there is no chance of recurrence in order for mootness to apply. No chance of

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[4] Plaintiffs argue that the mayor of Santa Maria and other community leaders backed Hispanics for the first time, Hispanic candidates received unprecedented financial contributions, and one week prior to the election, a story regarding this lawsuit was in the local newspaper. See Plaintiffs' Response to Order to Show Cause and Offer of Proof, pp. 10-12.

recurrence is but one of several exceptions to the mootness doctrine, none of which apply to the facts of this case.

a) Plaintiffs fail to show that the alleged vote dilution is likely to recur

The first exception to the mootness doctrine is that the alleged wrongful conduct is likely to recur. See Deakins v. Monaghan, 484 U.S. 193, 199 (1988). This exception requires Plaintiffs to show there is a reasonable expectation that they will be subject to the challenged activity. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).

Thus, as Defendants note, Plaintiffs have the heavy burden of demonstrating jurisdiction by establishing a "reasonable likelihood" or "reasonable expectation" or a "demonstrated probability" that they will be injured or subjected to vote dilution in the future or that the same controversy will recur involving the same litigants. Gamtel Corp. v. Community Redevelopment Agency of Los Angeles, 23 F.3d 1542, 1545 (9th Cir. 1994); Lee, 766 F.2d at 1390 ("the plaintiffs have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity").

Upon review of the papers submitted, the Court finds that Plaintiffs are unable to meet this burden. As such, the first exception to the mootness doctrine does not apply to this action.

b) The instant issue does not fall into the exception "Capable of Repetition, Yet Evading Review"

The second exception to the mootness doctrine is whether the issue is likely to recur; commonly referred to as the "capable of repetition, yet evading review" exception. See United States Parole Commission v. Geraghty, 445 U.S. 388 (1980). This exception is not intended for the instant fact situation. Most commonly, the issue involves a challenged action that is too short in duration to be fully litigated by a plaintiff before the alleged harm ceases (i.e., pregnancy or political campaigns). Thus, an action is per-

mitted to proceed, notwithstanding the named plaintiff's current lack of a personal stake, if it can be shown that the challenged action was too short in duration to be fully litigated while in existence; and that there is reasonable expectation that the plaintiff or a class he or she represents will be subject to the same action again in the future. See Id. at 398; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980).

As the alleged vote dilution is not an issue that is too short in duration to be fully litigated before the harm ceases, the second exception is not applicable to the instant case.

c) Based on recent U.S. Supreme Court decisions there is no effective relief still possible

"As long as a court can grant any effective relief, it does not matter that the relief originally sought is unavailable due to changed circumstances." Church of Scientology of Cal. v. United States, 113 S. Ct. 447, 450 (1992). Here, because any relief still available would not pass strict scrutiny as set forth in recent U.S. Supreme Court decisions, the exception does not apply. See Discussion, supra, regarding strict scrutiny analysis.

C. CONCLUSION

A federal court has no authority to give opinions upon moot questions. County of Los Angeles v. Davis, 440 U.S. 625, 627-630 (1979); Aquirre v. S.S. Sohio Intrepid, 801 F.2d 1185 (9th Cir. 1986). Thus, based on the Court's determination of this case being rendered moot by the 1994 election results, this action is dismissed pursuant to Rule 12(b)(1).

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Defendants Are Also Entitled to a Summary Judgment Ruling

Defendants request this action also be dismissed pursuant to Rule 56.[5] Having dismissed this case under Rule 12(b)(1) as moot, this Court is precluded from making any judgment on the merits of this action. Thus, the Court is prevented from making a determination on Defendants', or Plaintiffs', summary judgment motion.

However, although this Court believes unlikely, if the special circumstances doctrine does create a triable issue of fact as to whether this case is in fact moot, as Plaintiffs contend, the Court will also make a ruling on Defendants' summary judgment motion. As set forth below, upon review of all of the documents submitted for this motion, the Court also dismisses this action pursuant to Rule 56.

B. Summary Judgment – Standard of Review

A motion for summary judgment provides a procedure for terminating without trial actions in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party's burden to show the district court that there is an absence of essential evidence to support the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, the judge's function is not to weigh the evidence and determine the truth of the matter but to

---

[5] A non-moving party must be given notice of the summary judgment motion and an opportunity to respond. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986). As the Court notified the parties of its inclination towards dismissing the case as moot based on the 1994 election results and requested briefings from the parties on this issue, as well as setting the present motion on calendar to permit the parties to respond to one another's responses to the OSC, the notice and opportunity to respond requirements have been met for the Court's summary judgment determination.

determine whether there is a genuine issue for trial. Id. at 249-255.

There is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits. Id.

C. Requirements of a Vote Dilution Claim

An alleged violation of Section 2 of the VRA as amended, 42 U.S.C. § 1973, is determined through a three-prong analysis set forth in Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986). In order to prevail, a plaintiff must prove each of the following three prongs:

(1) that they are large enough and compact enough to constitute an effective voting majority in a single member district;

(2) that they are politically cohesive; and

(3) that white bloc voting usually defeats the preferred candidate of minority voters.

"Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' In 1982, Congress amended the VRA by changing the language of § 2(a) and adding § 2(b), which provides a 'results' test for violation of § 2(a). A violation exists if,

> 'based on the **totality of circumstances**, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b)." Bush v. Vera, 1996 WL 315857, at *15 (U.S.) (emphasis added).

Based on the totality of the circumstances of the instant action, the Court has determined that Plaintiffs fail to prove a violation under prong three (3) of the Thornburg test.

D. Factors Showing Plaintiffs Failure to Prove Prong Three (3)

1. Results of the November 1994 Election

The results of the November 1994 election are strong evidence that White block voting does not usually defeat the preferred candidate of Hispanic voters. The first two preferences of Hispanic voters, both Hispanic candidates, were elected to the two council seats up for election for four year terms. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶ 11. However, Anglo voters elected only one of their two preferred candidates for the two seats. Id. The first preference of Anglo voters was Bob Orach, who received only minimal support from Hispanic voters and thus was not elected. Id. However, candidate Abel Maldonado was elected despite not being one of the first two preferences of Anglo voters. Id.

2. Growth of the Hispanic Community in Santa Maria

Upon review of all of the statistics and expert testimony submitted, the Court finds that the eligible voting Hispanic population in Santa Maria is on the rise. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶¶ 6-9; Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, pp. 29-34. There is strong disagreement between the parties as to the amount of this growth. However, it is clear to the Court that no matter how the experts present the statistics there is no doubt that over the last decade the number of *voting eligible Hispanics* has risen. See Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1989).

3. The Use of a Bullet-Voting System in Santa Maria

The current election system employed in Santa Maria provides the greatest opportunity in an at-large system for a minority group to elect a preferred candidate. As explained in Defendants' Re-

sponse to the Court's OSC, "[i]n Santa Maria voters may cast two ballots in each election for the two open Council seats, but there is no 'anti-single shot' requirement that they must do so for their ballot to count. If they so choose, Hispanic voters may 'bullet vote' or cast just one ballot for a single Hispanic candidate and deny Anglo candidates their other vote, thereby improving the chances of electing the Hispanic candidate." See Defendants' Response to the Court's OSC, p. 9.

4. Hispanic Preferred Candidates Have Won in the Last Four Elections

In order to prevail under Section 2, Plaintiffs must prove that White bloc voting usually defeats the **preferred candidate** of minority voters. Thornburg, 478 U.S. at 48-51. Plaintiffs cannot prevail merely by showing that Hispanic candidates are usually defeated. See Shaw v. Hunt, 1996 WL 315870, at *10 (U.S.); Bush v. Vera 1996 WL 315857, at *20 (U.S.) ("Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes").

In three of the last four city council elections, the first preference of Hispanic voters was elected: Tom Urbanske in 1988 and 1992 and Abel Maldonado in 1994. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶ 10. Although Mr. Urbanske is not Hispanic, he was the first preference of Hispanic voters and thus his election provides the Court with evidence that Hispanic preferred candidates are not usually defeated by White bloc voting.

5. Strict Scrutiny Analysis

Finally, the Court had determined, supra, that any relief that could possibly be provided to Plaintiffs would not pass strict scrutiny analysis, pursuant to recent U.S. Supreme Court decisions.

Thus far, the U.S. Supreme Court has assumed that compliance with the results test of § 2(b) can be a compelling state interest. Bush v. Vera, 1996 WL 315857, at *15 (U.S.). Based on the above analysis, the Court has determined that Plaintiffs' action has not passed the results test of the VRA. Therefore, compliance

with VRA also does not provide Plaintiffs with a compelling interest.

E. Conclusion

"A Court must . . . ultimately find based on the totality of [all relevant] circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Shaw v. Hunt, 1996 WL 315870 *9 (U.S.) (citing 42 U.S.C. § 1973(b); Johnson v. De Grandy, 114 S. Ct. 2647, 2650 (1994)).

Upon review of the circumstances of the voting strength of the Santa Maria Hispanic community, the Court does not find that the Hispanic community has less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move the Court for an order for partial summary judgment pursuant to Rule 56(d), finding that Hispanics in the City of Santa Maria are sufficiently large and geographically compact to constitutes a majority of the voter-eligible population in a single-member district, and that Plaintiffs have thus satisfied the first prong of the three-prong analysis set forth in Thornburg.

Plaintiffs motion is DENIED. The Court has determined that this action has been rendered moot by the 1994 election results. Thus, it is irrelevant whether or not Plaintiffs have satisfied the first prong of Thornburg.

IV. PLAINTIFFS' EX PARTE APPLICATION TO STRIKE APPENDIX B FROM SANTA MARIA'S REPLY

Upon consideration and review, the Court hereby GRANTS Plaintiffs' ex parte application to strike Appendix B from Santa Maria's reply to Plaintiffs' opposition to Defendants' summary judgment motion. Thus, the Court did not consider the contents of Appendix B in deciding Defendants' summary judgment motion.

IT IS SO ORDERED.

DATED: August 28, 1996

/s/

JAMES M. IDEMAN
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, JOSEPH TALAUGON, ILTRA GARCIA and FRANCISCO DELGADO,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants.

Case No. 92 4879 JMI (SHx)

FILED NOVEMBER 17, 1995

STATEMENT OF UNCONTROVERTED FACTS AND ADMISSIONS ADVERSE TO PLAINTIFFS IN SUPPORT OF SANTA MARIA'S RESPONSE TO OCTOBER 27, 1995 ORDER

* * *

Undisputed Facts	Evidentiary Support
19. Joe Centeno has lived in Santa Maria nearly all his life, was with the Police Department for 35 years and was Chief of Police for 10 years. Plaintiffs concede that Joe Centeno had high name recognition and was thought of highly in the community, and did not need district elections to get elected. Dr. Engstrom admitted that Mr. Centeno's election was not a fluke and that he would be a formidable candidate any time he chose to run, and that Hispanic candidates with certain characteristics can get elected at-large. Plaintiff Joe Talaugon was not surprised Centeno won. Abel Maldonado is a young Hispanic businessman and Republican who grew up in Santa Maria, whose family has been in Santa Maria for years. He spent more money and put up more signs than anyone else. Plaintiff Joe Talaugon was not surprised Maldonado won.	Talaugon Testimony (See Section III.E., herein); Rabinovitz Declaration, Exh. C (at pp. 1-8); Engstrom Testimony (See Section III.A.2., herein).

* * *

[Testimony of Richard L. Engstrom, Expert Witness for Plaintiffs]

LOS ANGELES, CALIFORNIA; WEDNESDAY, SEPTEMBER 13, 1995;
10:03 A.M.

RICHARD L. ENGSTROM,
having been first duly sworn,
was examined and testified
as follows:

EXAMINATION

BY MR. McDERMOTT:

Q. Would you state and spell your full name for the record, please?

A. My name is Richard L. Engstrom, and the last name is spelled E-n-g-s-t-r-o-m.

(4)

* * *

Q. Fair enough. But now that you have examined the '94 election, what I'm trying to find out is whether you are attributing the results of the '94 election, particularly the election of Maldonado and Centeno, due to the fact that there was pending litigation?

A. I have no evidence that there is a direct linkage between their election and the pending litigation.

Q. I take it that you are not contending that Anglo voters voted for Maldonado and Centeno in hopes of ending the lawsuit or for the purpose of ending the

(13)

lawsuit?

A. I don't know that that's the case.

Q. Based on the deposition, there is no evidence of that?

A. I would agree, I have no evidence of that.
Q. And I take it that you are not contending that Hobbs and Tunnell endorsed Maldonado and Centeno for the purpose of electing an Hispanic to end the lawsuit?
A. I don't know whether they did that or not.
Q. Based on the depositions, there isn't any evidence of that, is there?
A. That there was a deliberate effort to moot the lawsuit?
Q. Yes.
A. There is no evidence of that in the depositions.
Q. And I take it that you are not contending that the money provided to Maldonado and Centeno by Anglo contributors was given to them for the conscious, explicit purpose of trying to end the lawsuit?
A. I have no evidence that that was the case.

(14)

* * *

Q. Isn't it true, based on the depositions, that neither the winners nor the losers believe that the litigation had any impact on the outcome of the election?
A. Well, I don't know about all the losers, but I would say from the depositions, I have no evidence that anybody directly attributed the outcome to the lawsuit.

(15)

* * *

This is not a situation where Anglos supported a minority candidate whom minorities did not support, correct?
A. By minority voters, that is correct.

(17)

* * *

Q. Let me restate it, because I thought I got it right. Both he and others testified that Orach and

his candidacy was hurt because Orach had declared for mayor initially, then changed his mind and ran for City Council when George Hobbs declared for mayor at the last minute?

A. Yes.

Q. Nonetheless, Orach was the Anglo of first preference –

A. Correct.

Q. – and he lost?

A. Correct.

Q. The Anglo first preference was vetoed by Hispanic voters, correct?

A. In the sense that if only non-Hispanic votes had been counted and Anglo votes had been

(18)

counted, he would have won. So in that sense, yes.

Q. So Hispanics elected both their preferences for the two seats that were open?

A. In '94, that's the case, yes.

Q. And Anglos elected only one of theirs?

A. Correct.

* * *

Q. Maldonado wouldn't have been elected if only Anglo or non-Hispanic votes had been counted, correct?

A. Correct.

(19)

* * *

If we turned to Table 4. . . let me find it here. In '92, Firth was the non-Hispanic second preference, correct?

A. Yes.

Q. And he would have been elected if oniy Anglo or non-Hispanic votes had been counted, correct?

A. Correct.

Q. So he was the Anglo preference in '92 and was vetoed by Hispanic voters, correct?

A. In the sense that he would have won if there had not been – if Hispanic votes had not been

counted, yes.

(20)

* * *

Q. In both '92 and '94, Hispanics were able to defeat Anglo preferences, who would have been elected if only Anglo or non-Hispanic votes had not been counted?

A. Correct.

(21)

* * *

The Anglo, non-Hispanic support for Hobbs and Bunch is such that it is not statistically significantly different between the two candidates if you accept those regression results, correct?

A. I think that would be the case, yes.

* * *

Q. Hispanics favored Bunch over Hobbs?

A. According to these tables, yes.

(22)

Q. And if the non-Hispanic vote is non-determinant as to who they preferred, Hispanic voters made the difference in who got elected mayor?

A. That appears to be the case, based on this table, yes.

(23)

* * *

Q. You have read all of the depo transcripts of all of the participants in all of the elections?

A. I believe all but two.

Q. And which two are those?

A. I think -- I think there may be a Volume II for Orach in '93 that I have not finished.

Q. There was -- his original deposition was two volumes.

A. I read the first volume.

Q. Okay.

A. And I have been into the second volume,

but have not been able to complete it.
Q. And what's the other?
A. The other is, I think, Urbanske in '93.
Q. That was one volume.
A. Yes.
Q. One day as I recall.
So everybody -- all the other transcripts you have read?
A. Yes.
Q. And that would include Guevara's original transcript?
A. Correct.

(28)

Q. Felix Martel?
A. Correct.
Q. Castillo?
A. Correct.
Q. Margie Lopez?
A. Right.
Q. Bob Orach, except for the one volume?
A. Yes.
Q. And Curtis Tunnell?
A. Yes.
Q. You read all of those?
A. Yes.
Q. Are you aware from the original Guevara deposition that he considered Martel, Lopez or Castillo as serious candidates?
A. I don't recall that.
Q. Are you aware that none of those three candidates have been in the community very long, or had done things in the community, or done very little in the community?
A. I'm aware of that for Lopez, and Castillo had not lived in Santa Maria for a long time. Did you also include Martel?
Q. Yes.
A. I don't recall that for Martel.

(29)

* * *

Q. I changed the framing of it around because we are getting hung up on "quality." And I'm talking about the Anglo voters, and you may have your views about quality, but I'm just simply asking whether it's plausible that instead of race, what explains the difference in outcome in '94 is that Anglo voters were responding to what they perceived as differences in the candidates who ran in '94, from those who ran prior -- in prior elections. Isn't that plausible?

(35)

A. That could be.

(36)

* * *

Q. I read your report as saying that Centeno was a quality candidate who was well known to both Hispanics and Anglos, had served the public through the police department, and ran a high profile, well-financed campaign. Fair enough?

A. Well, he had high name recognition, according to the deponents, coming into the election, based on his experience as the police chief in the city.

Q. Right.

A. And everything in the depositions indicated that people viewed his experience as police

(43)

chief positively.

Q. And don't you also assume that people, both Hispanic and Anglo, are also responding to the man? I mean, they knew him, they knew him as a serious, legitimate person who they could trust and rely on?

A. I would think that many people in the community knew of him, recognized his name and thought highly of him.

* * *

Q. Would it be fair to say that Joe Centeno

(44)

doesn't need district elections to get elected? He certainly didn't before?

A. He's certainly been elected at-large, correct.

Q. You are not contending that his election was a fluke?

A. Centeno's election?

Q. Yes.

A. No, I'm not.

Q. He would be a formidable candidate any time he ran?

A. I would suspect that would be the case, yes.

(45)

* * *

Q. So Hispanic candidates who have certain characteristics can get elected under Santa Maria's at-large election system?

A. Hispanic candidates have been elected under the system, so I suppose there are certain characteristics that one could say, candidates with those characteristics can be elected.

(46)

* * *

Would you agree that Castillo had not lived long in the community, or wasn't well known to either Hispanics or Anglos before he ran?

A. I believe he had not lived what one would consider a long time in the community. His visibility among Hispanics, I don't know. Apparently there is some confusion over his name and the name of his jewelry shop or something. I remember that.

* * *

(48)

Q. Except for Maldonado, correct me if I'm wrong, but Benedetti, Snyder and Firth all spent more than any other City Council candidate -- now I'm talking about the four council seats -- in these four

elections?
A. I think that's the case, yes.
Q. And they all lost?
A. Correct.

(49)

* * *

Q. So my question is, are you contending that there were special circumstances present in this election in November, 1994?

(58)

A. Compared to previous elections, yes.
Q. Okay.

* * *

(59)

And my point is, if an Hispanic candidate

(62)

ran, regardless of whether Hispanic -- what the Hispanic vote for that candidate was, wouldn't you expect an Hispanic candidate, who lived in the community a long time, to have a better chance of attracting stronger Anglo support than an Hispanic who hadn't lived in the community very long?
A. Everything else being equal, it's plausible.

(63)

* * *

Q. Abel Maldonado, even though he's only 26 years old, both he and his family have lived in Santa Maria for many years, yes?

(64)

A. I don't recall how long the family may have been here, but I believe he grew up there.

(65)

* * *

Wouldn't you expect that the Anglo support for an Hispanic candidate to be lower in an election

for two seats where there are two incumbents, than would be the case in an election without incumbents, all other things being equal?

A. All other things being equal?

Q. Yes.

A. If incumbency was perceived as a favorable characteristic at that time, yes.

(71)

* * *

Q. And incumbents usually win, correct?

A. As a general matter, yes.

Q. They have an advantage over non-incumbents, correct?

A. As a general matter, yes.

(76)

* * *

Q. There has never been an instance in those four City Council elections where an Anglo challenger unseated an Anglo incumbent, correct?

A. Hmm, let me. . . well, my memory escapes me, but was Firth an incumbent in '92?

Q. Oh, yes.

A. So you are not – okay. Miyoshi is not an Anglo.

Q. Not an Anglo. So your answer to my question is yes?

A. Well, let me look at the other tables. I forget who had incumbency status at every particular point in time. That's mayor. . .

Like I said, I don't recall if Firth was an incumbent.

(77)

Q. In '88?

A. Yeah.

Q. But Urbanske was?

A. I don't recall that either.

Q. You don't recall that either? Okay.

A. Tunnell I do recall being an incumbent; and Orach, I don't recall if he was, but –

Q. He was elected in '88 --
A. So --
Q. -- or '86, I mean.
A. So, yes, not including -- excluding Miyoshi, because he's Asian, I guess my answer is yes.

(78)

* * *

Q. Isn't the fact that there is increasing Hispanic -- an increasing number of Hispanic registrants and people turning out -- Hispanics turning out to vote, as a percentage of all voters, helpful to Hispanic candidates?
A. I believe so, yes.
Q. It improved the chances of the Hispanic candidates in '94, compared to the Hispanic candidates running in 1988?
A. That would be true.
Q. The four percent increase constitutes how many voters, roughly?
A. I don't recall.
Q. More than 84?
A. I believe it would have constituted more

(93)

than 84, yes.

(94)

* * *

Q. The '94 is a much better indication of -- is a better indication of the voting strength of Hispanics than the 1988 statistics, right?
A. Concerning today?
Q. Yes.
A. Yes.
Q. If a judge were sitting here saying what's the likelihood a Hispanic is going to get elected utilizing the '94 election, at least with respect to voting strength it's more closely associated with that than the 1988 election?
A. Correct.

(95)

* * *

Q. Are you aware that there is a significant increase in recent years in Hispanics naturalizing and gaining citizenship than was true in prior years?
A. I believe that is the case, yes.

(96)

* * *

Would it be fair to say that given demographic factors, naturalization trends, registration increases due to Motor Voter Laws, that Hispanic registration and turnout is likely to increase in the future in Santa Maria?
A. It would be my understanding that the city is becoming more Hispanic, and more of them will be able to register and vote, yes.
Q. So as time passes, their voting strength will increase?
A. Well, that's if everything stays the same and the trends continue.
Q. Okay, will you say that again?
A. You are talking – you are projecting.
Q. Yes.
A. So if things stay the same in terms of the trends, then that would happen.

(97)

* * *

Q. Would you agree that Hispanic chances of getting elected at-large are increasing in Santa Maria?
A. As the electorate gets more Hispanic?
Q. Yes.
A. Yes.

(98)

* * *

Q. But my point is, over four City Council elections, Hispanics elected four of their sev... preferences?
A. Well, wouldn't there have to have been

eight preferences?
Q. Well, not if you -- I don't think so, no.
But they elected four preferences over those four
elections?
A. Four times, yes.

(101)

* * *

MR. McDERMOTT: Okay. You have plenty of
time.
(Whereupon, at 12:27 P.M.,
the deposition of RICHARD L. ENGSTROM
was adjourned.)

RICHARD L. ENGSTROM

(112)

* * *

[Deposition Testimony of Plaintiff Joseph Talaugon From *Ruiz v. Santa Maria*].

Santa Maria, California
Wednesday, October 4th, 1995
4:20 p.m.
JOSEPH TALAUGON,
Having been sworn, testified as follows:
EXAMINATION
BY MS. DOMINGUEZ SILVERS:
Q. Good afternoon, Mr. Talaugon. Am I pronouncing
it correctly?
A. Talaugon.
Q. Talaugon?
A. Talaugon.
Q. My name is Aimee Dominguez Silvers, and I'm here
on behalf of the City of Santa Maria. I'm going to ask you
a few questions that will kind of update your previous
deposition. Do you remember when your deposition was taken
in this case?
A. Um-hum, yeah.
Q. So we're going to focus primarily on the 1994

23 elections.
24 A. Yeah.

(4)

* * *

13 Q. BY MS. DOMINGUEZ SILVERS: We were talking about
14 Mr. Centeno's campaign. First of all, in your opinion,
15 what is the city-wide impression or perception of
16 Mr. Centeno?
17 A. City-wide impression?
18 Q. Um-hum.
19 A. I don't know.
20 Q. Is he well-respected?
21 A. I don't know that. I know that he's got a -- his
22 background, being a Chief of Police, I think that people
23 know him by that.
24 Q. Would you consider him a well-respected figure in
25 the community?

(48)

1 A. Yes, I would say that.

(49)

* * *

17 Q. In your opinion, based on what you observed, did
18 Mr. Centeno run a good campaign?
19 A. Mr. Centeno?
20 Q. Yes.
21 A. What do you mean by "good campaign"?
22 Q. Able to influence the public to vote for him, get
23 his message out, be out there?
24 A. I don't know if he ran a good campaign.
25 Q Were you surprised when he won?

(57)

1 A. No.

(58)

* * *

6 Q. Was, in your opinion, Mr. Centeno the best known

of all of them?
A. I don't know that.
Q. No, your opinion. Just out of the candidates that come to your mind, is Mr. Centeno the most known in terms of name recognition out of the community?
A. You mean, out of all of the candidates?
Q. Yeah.
A. Best known?
Q. Or one of the one or two best knowns, let's put it that way.
A. Mr. Centeno, to be known, I would say he was pretty much at the top.
Q. At the top?
A. At the top, yeah.

(71)

* * *

If Mr. Maldonado received a significantly greater Hispanic support than Mr. Centeno did, would you be surprised?
A. I have to base my answer on his exposure again, his publicity.
Q. So is the answer, "No, I'm not surprised"? "Yes, I am surprised"?

(100)

A. I'm not surprised.
Q. Okay. Because?
A. Because he got more exposure.

(101)

* * *

MS. DOMINGUEZ SILVERS: Then, I think I will leave my diagram out and let the record stand the way it is the way he's testified regarding the impact of district elections. I have no other questions.
(WHEREUPON THE DEPOSITION WAS CONCLUDED AT 7:30 P.M.)

–oOo –

(140)

* * *

I declare (or affirm) under penalty of perjury, under the laws of the State of California, that the foregoing testimony is true and correct.

Signed and dated this _____ day of 1995, at _____, California.

_____

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(141)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, JOSEPH TALAUGON, ILTRA GARCIA and FRANCISCO DELGADO,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants.

Case No. 92 4879 JMI (SHx)

FILED JANUARY 22, 1996

SANTA MARIA'S RESPONSE TO PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN OPPOSITION TO SANTA MARIA'S MOTION FOR SUMMARY JUDGMENT

* * *

22. Santa Maria Fact Plaintiffs have created a Thornburg district containing a quarter of Santa Maria's total population and in which Hispanics are a 57% majority of the voting age citizens and registrants. Non-Hispanics or Anglos would be a majority of the voting age citizens and registrants in the other three districts. Santa Maria Evidentiary Support Ely Testimony (See [pp. 55-57 of Santa Maria Statement]); Morrison Declaration, Exh. A (at p. 21-22). Santa Maria Response Plaintiffs do not dispute this fact. Any "future" dispute about the ability to draw two Hispanic districts is clearly immaterial and irrelevant to Santa Maria's motion. As discussed in Santa Maria's Reply, the legal issues surrounding plaintiffs' proposed Thornburg district are clearly relevant to Santa Maria's motion and cannot be reserved until the remedy stage.	Plaintiffs Response Defendants claim that "Non-Hispanics or Anglos would be a majority of the voting age citizens in the other three districts." [citation omitted] Plaintiffs do not at this time dispute this fact, although it may be possible to draw two Thornburg districts in Santa Maria, and the statement would no longer be true. However, Plaintiffs contend that Defendants' contention is legally irrelevant to the issues to be determined at trial and in this summary judgment motion.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, *et al.*,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA, *et al.*,

Defendants.

No. CV-92-4879-JMI (SHx)

DECLARATION OF IRMA RODRIGUEZ IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * *

DECLARATION OF IRMA RODRIGUEZ

I, IRMA RODRIGUEZ, declare under penalty of perjury that:

1. I am counsel of record for Plaintiffs in this case. I have personal knowledge of each of the facts set forth herein. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

* * *

6. Attached hereto as Exhibit C is a true and correct copy of a summary of the expenditures of and donations to Santa Maria city council and mayoral candidates who filed financial disclosure forms with the Santa Maria City Clerk from 1988 to 1994. On information and belief, the data found on these summaries is accurate. This summary was prepared by Jaime Guerrero, a former lawclerk for Plaintiffs. I instructed Mr. Guerrero to review every financial disclosure statement filed by these candidates and to summarize them in the manner they are presented. A summary is attached hereto because the actual forms amount to over 2,000 pages. Plaintiffs are willing to provide these documents to the Court at the Court's request. A copy of this summary has been provided to Defendants under F.R.C.P. 26(b) as underlying materials used by Dr. Engstrom in his August 8, 1995 Report and a copy of the financial disclosure forms have also been provided to Defendants.

7. Based on the Santa Maria City council and mayoral candidates' financial disclosure summaries prepared by Mr. Guerrero, Margie Lopez raised $11,775.80 for her 1990 mayoral campaign; Gil Guevara raised $7,170.68 for his 1990 mayoral campaign; and Fernando Castillo spent $5,514 in 1990 for his mayoral campaign. In 1992, Mr. Castillo raised $1,670 and J. Stephan Jerger raised $1,145 in their campaigns for City Council. In 1994, Abel Maldonado raised $31,987, the largest amount by any candidate. He loaned himself $16,000. The candidate who spent the second-highest amount on his councilmanic campaign in 1994 was Trent Benedetti who raised $11,802.52. The council candidate raising the most money in 1988 was Floyd Snyder raising $11,976, in 1990 was Gil Guevara raising $7,170.68 and in 1992 was Toru Miyoshi who raised $7,323.

* * *

12. Attached hereto as Exhibit J is a true and correct copy of a memorandum which I prepared analyzing the racial and ethnic background of financial contributors to Hispanic candidates from 1988 to 1994. In preparing this memorandum I reviewed the list of contributors identified in the summary prepared by Jaime Guerrero, attached hereto as Exhibit C. The racial identification of the contributors was determined by the methods described in the memorandum. The interviews were conducted by Plaintiffs' paralegals.

* * *

[EXHIBIT C]

Monetary Contributions Received

1994 - TRENT BENEDETTI (candidate)

	8/12-9/30	10/1-10/22	10/23-12/31	Totals
[List of Donors Omitted]				* * *
Totals	3,803.00	4,444.28	3,555.24	$ 11,802.52

1994 - JOE CENTENO (candidate)

	1/1-9/30	10/1-10/22	10/23-12/31	Totals
Joe Centeno Loan	3,100.00			$ 3,100.00
[List of Donors Omitted]				* * *
Totals	7,170.00	2,248.00	1,578.00	$ 10,996.00

1994 - GIL GUEVERA (candidate)

	7/1-9/30	10/1-10/22	10/23-12/31	Totals
Gil Guevara (Loan)	450.00	300.00		$ 750.00
[List of Donors Omitted]				* * *
Totals	749.00	1,197.00	802.78	$ 2,748.78

[Two Candidates Omitted] * * *

1994 - ABEL MALDONADO (candidate)

	8/1-9/30	10/1-10/22	10/23-12/31	Totals
Agro-Jal Farms, Inc. (Loan)		5,000.00	11,000.00	$ 16,000.00
[List of Donors Omitted]				* * *
Totals	4,158.00	10,745.00	17,084.00	$ 31,987.00

[Candidate Omitted] * * *

1994 - ROBERT S. ORACH (candidate)

	1/1-6/30	7/1-9/30	10/1-10/22	10/23-12/31	Totals
Robert S. Orach (Loan)	200.00	200.00			$ 400.00
[List of Donors Omitted]					* * *
Totals	295.00	2,650.00	3,196.00	1,964.00	$ 8,105.00

[EXHIBIT J]

CONFIDENTIAL MEMORANDUM

The following analysis is based on interviews with candidates Martel, Lopez, Castillo and Guevara. The list of contributors is taken from the list prepared by Jaime Guerrero as those who contributed to the Hispanic candidates based on the financial disclosure forms. For those who contributed to the Maldonado and Centeno campaign an attempt was made to interview them. (interview script attached) If the contribution was made by a company, the person who owned the company or the person who was identified as the person who would make the decision to make a donation to Maldonado or Centeno was interviewed. If a person was unavailable for an interview or unwilling to be interviewed, a determination of the racial background of the contributor was ascertained by asking Plaintiffs, and/or previous Hispanic candidates. The Plaintiffs and previous Hispanic candidates knew who these persons were either because they had had contact with them because they were farmers or because they were business owners with whom they had interacted or they knew them from other contexts. If they did not know, then the racial background of contributors was ascertained through use of the 1980 Census List of Spanish Surnames. Those persons who identified themselves as Portuguese, were not considered Hispanic. If a contributor is Portuguese, this is marked by a "P" next to their ethnic category.

For those joint contributions for whom one of the contributors was Hispanic, we considered the donation to have been made by a Hispanic. It will be noted in the "source" column how we verified the racial background of the contributors.

Contributors to Hispanic Candidates[1]
1988-1994

[1988, 1990, 1992 Candidates Omitted] * * *

1994 Gil Guevara

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$1,998.78
TOTAL AMOUNT FROM NON-HISPANICS	$ 252.78
TOTAL NUMBER OF CONTRIBUTORS	9
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	2

1994 Joseph Centeno

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$7,896
TOTAL AMOUNT FROM NON-HISPANICS	$4,550
TOTAL NUMBER OF CONTRIBUTORS	17
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	13

1994 Abel Maldonado

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$15,987
TOTAL AMOUNT FROM NON-HISPANICS	$ 6,625
TOTAL NUMBER OF CONTRIBUTORS	52
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	27

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1 These contributions do not include loans that the candidates made to themselves. The total amount raised also does not include loans the candidates made to themselves. The total amount raised also includes the amount raised from non-itemized contributions.